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IN THE

Supreme Court of the United States

October Term, 1955

NO. 817

COMMONWEALTH

vs.

LEO COLEMAN alias CLEE COLEMAN
CASWELL CURTIS
ROY DIXON
JOSEPH FORD
CAESAR NELSON

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 195

No.

Commonwealth

vs.

Leo Coleman, alias
Clee Coleman

Caswell Curtis

Roy Dixon

Joseph Ford

Caesar Nelson

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT

Roy Dixon, petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered in the above entitled case on January 5, 1956, reargument denied on January 19, 1956, as of January Term, 1956, Nos. 74 and 75.

CITATIONS TO OPINIONS BELOW

1. The Opinions of the Supreme Court of Pennsylvania, rendered on January 5, 1956, are reported in 383 Pa. 474, 119 A. 2d 261, and are printed in Appendix A hereto, infra, pp. 68, 69. The said Opinions consist of the per curiam affirmance of the judgment of the Superior Court of Pennsylvania on the Opinion of Judge Ervin for the Superior Court of Pennsylvania and the dissenting opinion of Mr. Justice Musmanno in which Mr. Justice Bell concurred in part. Mr. Justice Chidsey did not participate in the argument or decision before the Supreme Court of Pennsylvania.

2. The Opinion of the Superior Court of Pennsylvania, rendered on July 21, 1955, is reported in 179 Pa. Superior Court 1, 115 A. 2d 811, and is printed in Appendix A hereto, infra, p. 58.

3. The opinion of Court of Oyer and Terminer and General Jail Delivery for the City and County of Philadelphia is unreported and is printed in Appendix A hereto, infra, p. 31.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on January 5, 1956. A timely petition for reargument filed on January 13, 1956 was denied on January 19, 1956. The jurisdiction of this Court is invoked under the Act of June 25, 1948, C. 646, 62 Stat. 929, 28 U.S.C.A. 1257 (3).

QUESTIONS PRESENTED

1. Have the provisions of the Fourteenth Amendment of the Constitution of the United States, which guarantee to every citizen of every state the right and protection of not being deprived of his liberty without due process of law, been violated, or can it be said that in all fairness and justice the defendant has received a fair, unprejudiced and impartial trial where:

(a) In the course of a highly publicized and sensationalized trial of a Republicon ward leader the Assistant District Attorney improperly attributed to the defendant a responsibility for an alleged 69 years of Republican misrule in Philadelphia;

(b) In the course of the trial the Assistant District Attorney depicted himself, by his remarks in front of the jury, as being in charge of "racket investigation" and stated, and restated after admonishment, that he had not called certain witnesses because they would be killed by the defendants;

(c) The above remarks were made in an extended trial of five defendants jointly on a multiplicity of counts, in which the guilt of the four principal defendants sufficiently appeared, but the evidence against the appellant, by a full and fair analysis of the testimony, must reasonably be deemed to be unsatisfactory and insufficient to sustain a verdict of guilty.

2. Have the provisions of the Fourteenth Amendment of the Constitution of the United States, which guar-

antee to every citizen of every state the right and protection of not being deprived of his liberty without due process of law, been violated where the appellate courts of the state have sustained a conviction by ignoring an infringement of the appellant's right to trial by jury and by permitting the conviction to stand in the face of an unreversed appellate decision which cannot reasonably be distinguished from the instant case?

3. Is it a denial of due process for the appellate courts of a state to declare that the practice of interviewing jurors after a verdict is unethical and improper, and in a subsequent case to assume as an incontrovertible fact that jurors obeyed a Trial Judge's instructions not to discuss the case at dinnertime, after the case had been submitted to them.

STATUTE INVOLVED

U.S.C.A., Constitution of the United States, Amendment XIV.

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges of immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.*" (Emphasis supplied).

STATEMENT OF THE CASE

The petitioner was jointly indicted in Philadelphia County on Bills of Indictment Nos. 563 and 564 of February Sessions, 1954 with four other defendants, Caswell Curtis, Joseph Ford, Caesar Nelson and Leo Coleman. In Bill of Indictment No. 563 of February Sessions, 1954, the defendants were charged, in various counts, with Conspiracy to Commit Bribery and Corrupt Solicitation of certain police officers, and with Bribery and Corrupt Solicitation. In Bill of Indictment No. 564 the defendants were charged with Setting Up, Maintaining and being concerned in an illegal lottery and in the final count, they were charged with conspiracy to maintain and be concerned in a lottery. In addition to these Bills, the defendant, Leo Coleman, alone, was indicted on Bill of Indictment No. 861 of August Sessions, 1953, charging him with setting up an illegal lottery.

All of the defendants pleaded not guilty and the matters came on for trial on March 15, 1954, before the Honorable Louis E. Levinthal and a jury.

On March 24, 1954, the jury rendered its verdict convicting all defendants. The jury found the petitioner guilty on counts 1, 2, 7, 8 and 13 on Bill of Indictment No. 564 on the charges erecting and being concerned with lottery and conspiracy to commit lottery, and not guilty as to counts 3 and 9. The petitioner was acquitted on Bill of Indictment No. 563 charging him with bribery and conspiracy to commit bribery, but said acquittal was by direction of the Court. All defendants filed motions for new trial and in arrest of

judgment which were, pertinent hereto, dismissed on November 4, 1954. The defendants were sentenced on November 10, 1954. All defendants have served their sentences with the exception of petitioner. Your petitioner has prosecuted appeals through the Superior and Supreme Courts of Pennsylvania as hereinbefore indicated.

During the course of the trial the Assistant District Attorney made various highly prejudicial remarks. The petitioner now relies upon only two of these remarks as being so improper and prejudicial as to deprive the defendant of the fair and impartial trial to which he was entitled. The first remark was as follows:

> "Mr. Crippins: I would like the record to show Mr. Charles Baker is Deputy Commissioner of City Property.
>
> Mr. Witkin: Democratic City Commissioner.
>
> Mr. Crippins: He would only be a Democrat because the Democrats are in, Mr. Witkin, after 69 years of misrule.
>
> Mr. Witkin: If Your Honor please, I move for the withdrawal of a juror.
>
> The Court: Motion denied; exception granted. The jury will be strongly urged to ignore completely all references to Republicans and Democrats. We are here as Americans. We are not concerned with the party allegiance of any of the witnesses or any of the defendants or any of the persons referred to.
>
> Mr. Crippins: Nor was I seeking to give that. And I wish to apologize to the Court at this time, but

I should also like to point out that Mr. Witkin started it. That is all."

This remark and the Trial Judge's ruling were assigned as petitioner's 45th reason in support of his motion in arrest of judgment (R. 809a) and in support of his motion for new trial (R. 853a).

The second remark was as follows:

"Mr. Crippins: If Your Honor pleases, Mr. Mitchell's name is not on any of the bills; he was not used at the grand jury, and I can assure Mr. Witkin that there are certain other witnesses who were questioned for weeks who were not called here, again for security reasons. We can't give their names.

The Court: It would be improper to produce that evidence.

Mr. Crippins: They were sitting here in this courtroom and were not called because we want them to live after this is over.

Mr. Witkin: May it please Your Honor, Mr. Crippins has just made the statement—

Mr. Crippins: He made—

Mr. Witkin: I am addressing the Court. Mr. Crippins has just made the statement they have not been called because 'we want them to live after this case is over'.

Mr. Crippins: That is right.

Mr. Witkin: I know of no remark more prejudicial to the defendants than this one, and on behalf of Roy Dixon and also on behalf of my colleagues for

their respective defendants, I again most reluctantly and unwillingly ask for the withdrawal of a juror.

The Court: The motion to withdraw a juror is denied. I will say to the jury that I caution you very urgently to ignore the last few words spoken by Mr. Crippins. They were not in order and it is not evidence. It is not a proper issue in this case.

Mr. Crippins: I apologize to the Court, but we just read a letter into evidence giving the same view.

The Court: It spoke of security.

Mr. Crippins: Right. I ask, if Your Honor please, that Your Honor take charge of this voucher, look at it, and see that it has no relevancy.

The Court: If it has no relevance, it won't be admitted."

This remark and the Trial Judge's ruling were assigned as petitioner's 53rd reason in support of his motion in arrest of judgment (R. 814a) and in support of his motion for new trial (R. 858a).

The court of first instance ruled that these remarks were elicited by the defense; that there was sufficient admonition to ignore the improper remarks. The Superior and Supreme Courts of Pennsylvania ruled likewise. The federal question of petitioner's entitlement to a fair, impartial and unprejudiced trial was preserved at all times, both in the court of first instance and in the appellate courts of Pennsylvania so as to give the Supreme Court of the United States jurisdiction to review the judgment on writ of certiorari.

The petitioner's contention is that not only was he deprived of a fair and unprejudiced trial by these improper tactics of the Assistant District Attorney, but there has been a *judicial* denial of due process. No matter how many times the courts of Pennsylvania may truncate this record, the truth remains the same—there was *no* provocation for these remarks and the so-called admonitions by the learned Trial Judge were inadequate and themselves prejudicial. It shall be developed hereinafter that it is a serious denial of due process, in the judicial process itself, for a court or courts to quote out of context or improperly slant a record in order to sustain a conviction.

The second and third questions may be consolidated for consideration. In Pennsylvania the common-law jury system is still in force. Under the Act of May 1, 1935, P. L. 127, 17 Purdon's Statutes Annotated, Section 1153, there is allowed the selection of two alternate jurors who "shall be discharged upon final submission of the case to the jury". After the learned Trial Judge charged the jury, he permitted the alternates to have dinner with the jury. In the earlier case of *Commonwealth vs. Krick,* 164 Pa. Superior Ct. 516, 521, 67 A. 2d 742, it was held that "To allow the alternates any opportunity to deliberate with the others after the case had been submitted was a direct violation of the Act".

This was assigned as petitioner's 66th reason in support of his motion for new trial (R. 869a) and in support of his motion in arrest of judgment (R. 825a).

The court of first instance and the appellate courts ruled that it must be assumed that the jury followed the Trial Judge's instructions not to discuss the case.

The petitioner's contention is that the instant case cannot reasonably be distinguished from the unreversed decision in the Krick case; that it is a judicial denial of due process to deprive the defendant of the benefit of an unreversed appellate decision by endeavoring a distinction where there is none. The petitioner further contends that there is effected a judicial denial of due process where the appellate courts have declared inquiry into the actions of the jury to be improper and unethical conduct and at the same time conclude *as a fact*, without evidence, as to the actions of the jury outside of the courtroom.

ARGUMENT

A. THE DUE PROCESS CLAUSE OF 14TH AMENDMENT IS VIOLATED BECAUSE OF THE IMPROPER AND PREJUDICIAL REMARKS OF THE ASSISTANT DISTRICT ATTORNEY

During the trial it was quite properly developed that the defendant Dixon was a Republican ward leader and in the course of the examination of the Commonwealth witness, defense counsel quite properly elicited the fact that the witness was recently employed by the City of Philadelphia at the request of a Democratic Committeeman and the Assistant District Attorney commented, "He would only be a Democrat because the Democrats are in, Mr. Witkin, after 69 years of misrule." This remark injected into the case an improper and prejudicial question of good or bad government. The City was then and in fact still is involved in political turmoil. But this defendant was entitled to stand trial solely on the questions set forth in the Bills of Indictment; he was not required to stand trial for the merits or demerits of the Republican Party in Philadelphia. Such remark was doubly prejudicial to this defendant in view of the fact that he was at the time of the events charged a Republican ward leader and in view of the fact that the evidence involved various Republican committeemen. The effect of this remark must be considered in the entire context of this trial—the extraordinary publicity given to this trial, the atmosphere of crusade created by

the District Attorney's office, particularly the District Attorney's conduct of the investigations and interrogations, the trial of Roy Dixon together with the other defendants in a matter made deliberately complicated by compounding the charges and compounding the number of defendants.

In the course of this trial the Assistant District Attorney stated that he was not calling certain witnesses "again for security reasons" although they were sitting in the courtroom and because "we want them to live after this is over" (the remark, objection, colloquy and the ruling of the court appear at Record pages 635a-637a). Again, considering the total pattern of this trial, it is difficult to conceive of a more despicable, unwarranted comment implying that the defendant would engage in murder. There could be no other meaning to this remark.

The opinion of the learned Trial Judge for the court below and the opinion of the Superior Court both half-truth the facts and are simply incorrect in their slant of language.

The lower court in its opinion and the Superior Court of Pennsylvania both purported to excuse the District Attorney's improper remarks by alluding to provocation by the defense. The lower court stated:

> "In the instant case, counsel for defendant Dixon objected to remarks made by the Assistant District Attorney such as the following during the examination of the witness William Bailey:
>
> 'Mr. Crippins: He would only be a Democrat because the Democrats are in, Mr. Witkin, after 69 years of misrule.' [Record page 501a]

> But it is to be noted that counsel for defendant Dixon prior thereto, in the course of a few minutes, repeated not less than nine times that the witness had been given a job by the Democratic official. This situation falls within the rule that the defense may not complain of an improper remark elicited by himself from the District Attorney."

That is an incredible distortion and abandonment of our judicial values. The questions asked by the defendant's counsel were perfectly proper and were perfectly proper forensic technique. There wasn't an objection to any of these questions by the Assistant District Attorney which is the proper and judicially accepted method of putting in issue the propriety of defense questions. It must be borne in mind that the court on the previous occasion of Mr. Crippins' improper remark about "trick questions" had admonished him and stated that there were no trick questions; that if he considered any questions improper he was to object and the court would rule on the objections; that it was his duty to object and that the jury was to pay no attention to his reference. The defense was quite legitimately bent upon showing the bias and the prejudice of the witness, William Bailey, who had switched from Republican to Democratic affiliation and had been procured a job by the Democratic administration and a Democratic officeholder. It must be borne in mind that the Assistant District Attorney also referred to the fact that Bailey secured his job prior to the probe (Record page 499a); that the witness Bailey secured a job in the Democratic administration, not from the defendant, Roy Dixon, whom he had asked for a job; that the witness Bailey worked at the polls for the defendant, Roy Dixon in November, 1952, prior to

the time he went to work for the City in March, 1953. Therefore, the Assistant District Attorney was engaged in an effort to prove that his witness was not biased by endeavoring to point out that the witness Bailey went to work for the City prior to the probe on which this case was based. Thus, the defendant's counsel undertook to show that it was a Democratic committeeman who had procured the witness' job for him in a legitimate effort to establish the witness' bias. This inquiry commencing at Record page 500a culminated in Mr. Crippins' outrageous remark. Nowhere in this record, and particularly at the point of this remark, is there even a hint or scintilla of intimation by any of the defense counsel that there was any political misrule or proper rule by any political party or faction.

The learned Trial Judge could not erase from this record the reality of the fact that innumerable references had already been made to facts showing party affiliations; he failed to admonish the Assistant District Attorney and omitted any statement as to whether there was or was not any period of 69 years of misrule by Republicans or to sharply point out that this defendant was not to be judged by any such argument. The Assistant District Attorney's statement that he was not seeking to give that impression was not an apology; it was simply untrue. His apology to the Court with the equally untrue statement "that Mr. Witkin started it" certainly did not serve to erase anything from the jury's collective mind.

The Lower Court stated in its opinion the following:

> "Another remark objected to was the statement by the Assistant District Attorney that certain wit-

nesses were not being called because, 'We want them to live after this is over'.

Again, this was elicited by the introduction of defendants' Exhibit 'F' which contained a statement that the witness Dolores Perry was in fear of her life because of her connection and knowledge of defendant Coleman's business. This statement was therefore based on evidence of record introduced by the defendant himself.

Furthermore, it is a matter of record that the Trial Judge never failed, after every heated exchange between counsel, to warn the jury to disregard any such remarks and to judge the case solely on competent evidence produced by them."

(Record pages 902a, 903a)

We again must respectfully submit that these paragraphs reflect an incredible excuse for impropriety, coupled with an incorrect version of the record. Six times, it is true, the Trial Judge was obliged to request the jury to ignore the Assistant District Attorney's remarks. The lower Court makes reference to "every heated exchange between counsel". That is incorrect. These six times compounded improper remarks of the Assistant District Attorney were quite unilateral; they were not exchanges, heated or otherwise.

The reference by the lower Court to defendant's Exhibit "F" certainly cannot be regarded as a provocation of a remark by the prosecution which imports to this defendant the responsibility for future murder. Such remark was, *in context*, unprovoked and disgraceful. If Dolores

Perry was in fear for her life because of her connection with and knowledge of Coleman's business, that was certainly no excuse for the prosecution intimating that defendant, Roy Dixon, was responsible for said fear or even capable of inducing such fear. Exhibit "F" was not an excuse for such misbehavior on the part of the Assistant District Attorney. Even assuming that such improper statement was "based on evidence of record", which defendant certainly does not concede, that would not excuse the impropriety of such remark.

The following appears commencing at Record pages 629a-631a:

"Mr. Witkin: May it please Your Honor, I have no objection to reading the entire letter, but *I am particularly getting the letter into evidence for reading a portion of it that I think is material to this case.* If Mr. Crippins wants me to read it all, it is perfectly agreeable to me. As a matter of fact, I can see that he does not object, and I will read the entire letter.

Mr. Crippins: I will even go this far. If he doesn't want to read it, I will agree to its being put in evidence so the Jury can carry it out.

Mr. Witkin: That is agreeable to me. I will direct the attention of the Jury to it.

The Court: Read the entire letter.

Mr. Witkin: 'January 29, 1954.

The Honorable Lennox L. Moak, Director of Finance, 903 City Hall Annex, Philadelphia, Pa.

Dear Len:

I am writing to you concerning the attached bill from the Benjamin Franklin Hotel totaling $534.66,

covering the period from October 5 to October 16. When, on October 1, 1953, Harry Lowry came into Police Commissioner Gibbon's Office with his information, we learned that one of the key witnesses was a woman by the name of Dolores Perry.

This lady had worked right in the office of the bank where the numbers were turned in and where all the computations were made, including the various deductions for police protection, etc.

We also learned that Mrs. Perry had fled from Philadelphia because of fear of arrest and was in Pittsburgh in fear of her life.

With the cooperation of the Pittsburgh Police Department, we located Mrs. Perry and persuaded her to come back to Philadelphia voluntarily.

In order to do this we had to promise her complete protection and also that she would be put at some place outside of the negro district where her identity could be kept secret.

As a result we arranged for her to stay at the Benjamin Franklin Hotel.

In addition to Mrs. Perry we brought back from Georgia a gentleman by the name of Buddy Mitchell, with whom Mrs. Perry had been keeping house and by whom she had a child. When we brought Mrs. Perry back to Philadelphia, she was still terrified and afraid to do very much talking.

In order to show her that we meant what we said, we did extend to her a few small luxuries, such as

ready access to room service, maid service, laundry service, a rented television set, etc.'

This is the part I wanted to read:

'The result was that after a few days Mrs. Perry settled down, got her nerves under control and gave us some extremely valuable information. However, it did take time.

The hotel accommodations consisted of a sitting room and 2 bedrooms for Mrs. Perry, her child, Buddy Mitchell, and 2 policewomen. We also had on hand at all times a county detective, and all these people had to be fed. That is the reason for the hotel bill of $534.66.'

Mr. Witkin: Your Honor has not given me the chance to tell why I put that record in. (Record pages 635a-637a). That record was to bring Buddy Mitchell here. He has never been called as a witness. I have a right to argue from that that where they bring a witness from Georgia and do not call him, and spend all that money to bring him, that there must be some reason why they have not called him. I am frank to say to Your Honor that is the sole purpose of putting that in.

The Court: All you have to do is refer to the fact that Buddy Mitchell was living at the Benjamin Franklin Hotel. It has already been referred to in the letter of Mr. Dilworth, that Mr. Mitchell and the child were brought up from Atlanta, Georgia. How much was spent in bringing them up here is immaterial, whether it was $5 or $500.

Mr. Witkin: Remember this, may it please Your Honor, the purpose of even offering that letter was not to show that.

The Court: I know, but it is in.

Mr. Witkin: The purpose of offering that letter was to contradict the Commonwealth's witness that I will refer to later.

The Court: It is in.

Mr. Crippins: If Your Honor pleases, Mr. Mitchell's name is not on any of the bills; he was not used at the grand jury, and I can assure Mr. Witkin that there are certain other witnesses who were questioned *for weeks who were not called here, again for security reasons.* We can't give their names.

The Court: It would be improper to produce that evidence.

Mr. Crippins: *They were sitting here in this courtroom and were not called because we want them to live after this is over.*

Mr. Witkin: May it please Your Honor, Mr. Crippins has just made the statement—

Mr. Crippins: He made—

Mr. Witkin: I am addressing the Court. Mr. Crippins has just made the statement they have not been called because 'we want them to live after this case is over'.

Mr. Crippins: *That is right.*

Mr. Witkin: I know of no remark more prejudicial to the defendants than this one, and on behalf of Roy Dixon and also on behalf of my colleagues for their respective defendants, I again most reluctantly and unwillingly ask for the withdrawal of a juror.

The Court: The motion to withdraw a juror is denied. I will say to the jury that I caution you very urgently to ignore the last few words spoken by Mr. Crippins. They were not in order and it is not evidence. It is not a proper issue in this case.

Mr. Crippins: I apologize to the Court, but we just read a letter into evidence giving the same view.

The Court: It spoke of security.

Mr. Crippins: Right. I ask, if Your Honor please, that Your Honor take charge of this voucher, look at it, and see that it has no relevancy.

The Court: If it has no relevance, it won't be admitted." (Emphasis supplied)

It should be carefully noted that the defense explicitly sought to introduce Exhibit "F" for the limited purpose of contradicting Mrs. Perry's testimony. The reference to Mrs. Perry's fear was unquestionably hearsay. Where is there the slightest provocation or excuse for the Assistant District Attorney to make such utterly improper and prejudicial statements? He was not a witness and was not under oath. And after he made the remark reprehensibly reendorsed it, after objection, by stating, "That is right." Just what did the learned Trial Judge do as to erase this terrible accusation from the jury's collective mind? He "cautioned" the jury to ignore the "last few words" and said it was "not a proper issue". But it was left as an issue. By the Assistant District Attorney's deliberate, improper remarks he thrust upon the defendant, Roy Dixon, in a colloquy with Dixon's attorney, the burden of collateral issues of murder—of vague and dread gang murder with-

out evidence or witnesses, being his own unsworn accuser and witness.

The governing rule which is applicable was set forth in *Commonwealth vs. Blose*, 160 Pa. Superior Ct. 165, 170 (1947), 50 A. 2d 742, as follows:

> "The best approach to a rule we have found is the recent pronouncement by Mr. Justice Rutledge in Kotteakos vs. United States, 328 U.S. 750, 66 S. Ct. 1239, 1248. After analyzing the Act of Congress (28 U.S.C.A. 391), relating to harmless errors, he said: 'If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress . . . But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.' "

See also *Commonwealth vs. Roberts*, 161 Pa. Superior Ct. 548 (1947), 55 A. 2d 577, in which the Court considered the effect of an improper remark where the evidence of defendant's guilt was not overwhelming aside from any question as to the legal sufficiency of the evidence.

It is respectfully submitted that the Assistant District Attorney's remarks, and indeed his entire demeanor during the trial of this matter, were calculated to impute to the defendants a general association with criminal mobs and a propensity for killing witnesses. These remarks could not be ignored by the jury or put out of their minds by the admonition of the learned Trial Judge to do so.

The Superior Court of Pennsylvania in affirming the judgment of conviction placed its greatest emphasis on the supposition that the jury could not have been prejudiced because the defendant Dixon was acquitted of two counts on Bill of Indictment No. 564 and found not guilty on Bill No. 563. *Such reasoning ignores the truth that there was absolutely no evidence whatsoever upon which Dixon could possibly have been convicted on these two counts;* the Assistant District Attorney, in his final argument to the jury, conceded that Dixon was not involved in these counts. Of course, the jury acquitted him; as to the acquittal on Bill No. 563, the Court ordered such acquittal and the jury obeyed. Such findings by the jury certainly cannot be properly used as a basis for supposing that the jury was "discriminating"; that it was not prejudiced by the District Attorney's remarks.

The Superior Court of Pennsylvania, in its opinion, stated, "The jury knew from the evidence already placed in the record with defense counsel's approval that this witness was terrified, afraid and in fear of her life. We doubt that any additional prejudice would arise from the statement of the Assistant District Attorney that other witnesses were in fear". That is a striking example of the very prejudice which was induced into the jury. Whether any witness was fearful for his life was certainly hearsay

and inadmissible. But the whole point is that the Assistant District Attorney didn't say "other witnesses" were afraid, but that he himself was afraid. He was the unsworn, dread accuser, coupled with his own statements of record that he had charge of the investigation.

It is respectfully submitted that an honest search of this record goes begging if there is an endeavor to milk provocation out of this record. The defense counsel—all five of them—were restrained in their behavior in the trial of this case. A reading of the entire record will demonstrate that the Assistant District Attorney was antagonistic throughout; that he indulged himself in improprieties over and over again without any provocation by the defendant's counsel. Insofar as in several places in the record the trial judge remarked as to the behavior of both the Assistant District Attorney and defense counsel, the Court was not justified in treating the matters as of equal misconduct. Indeed a reading of the record yields an abiding conviction that the Trial Judge was a conscious element of a determination to secure a conviction of all defendants. The tone of the Trial Judge's prejudices is felt on the basis of the dry record alone.

The Assistant District Attorney cast himself in this case in both the capacity of District Attorney and investigator. The trial depicted his role throughout as one of morality astride a white horse riding forth against the forces of "evil", i.e., numbers and mobs. There is, of course, nothing wrong with riding forth against "evil", but in returning with scalps via the judicial process there are elementary and basic aspects of fairness by which we are to determine the question of "evil". If we assume evil before it is properly proved, we engage in less than a ju-

dicial determination. That a partisan Assistant District Attorney conceives that he has satisfied himself as to a defendant's guilt in the course of his own conduct of an investigation, is not the test for overlooking gross improprieties, he is a quasi-judicial officer and must endeavor to prove his case in a fair, calm and dispassionate manner.

It is a mockery of trial procedure to call on the defendant, whose freedom is in most delicate balance, to display a tolerance for the misguided ardor and improprieties of the prosecution.

It is most earnestly contended that there is not a lesser duty owed to the rules of propriety in a case where freedom, as distinguished from life, is at stake.

In *Minker vs. United States,* 85 F. 2d 425 (C.C.A. Pa. 1937), reversing 12 F. Supp. 783, it was stated that a prosecutor has a duty to use every legitimate means to bring about a just conviction, but he has a concomitant duty to refrain from improper methods calculated to produce a wrongful conviction.

In *Berger vs. United States,* 295 U.S. 78 (1935), the Court stated that the United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation is to govern all and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold arm of which is that guilt shall not escape nor innocence suffer. The Court stated the District Attorney is not at liberty to strike foul blows.

The utter impropriety of appellant's conviction and the effect of the Assistant District Attorney's remarks may be considered from the remarkable absence in the record of reference to this appellant. It is impossible to adequately review the evidence in this petition. That impossibility was created by the District Attorney who insisted on a joint trial of five defendants and multiple counts against each defendant.

B. THE DUE PROCESS CLAUSE OF 14TH AMENDMENT IS VIOLATED BY THE *JUDICIAL* PROCESS IN THIS MATTER

The petitioner recognizes and concedes that the due process clause of the Federal Constitution does not comprehend the right to trial by a common-law jury; that the specific guarantees contained in the first ten amendments to the Constitution are limited in their direct application to the Federal Government alone, except insofar as they may be deemed to constitute an element of due process or to be incorporated into the due process clause of the 14th Amendment which does apply to the individual states. However, petitioner does contend that where the State has seen fit to preserve the common-law jury right, it is incumbent upon the state to administer that right fairly.

In Pennsylvania, the right to trial by jury as it existed at the common law has been preserved by Article I, Sec. 6 of the Pennsylvania Constitution. In order to authorize the use of alternate jurors there was adopted the Act of

May 1, 1935, P.L. 127, 17 Purdons Statutes Annotated, Section 1153 which provides as follows:

> "If in any trial, civil or criminal, in any of the courts of common pleas, municipal courts, and county courts, quarter sessions of the peace, or oyer and terminer and general jail delivery of any county, it is the opinion of the trial judge that the trial is likely to be a protracted one, and the district attorney or counsel for the plaintiff or for the defendant, or both, shall request the selection of two additional jurors as alternates, the court shall have power to allow the drawing of two additional jurors. Such alternate jurors shall be seated near the jury, with equal power and facilities for seeing and hearing the proceedings in the case, and shall take the same oath as the other jurors selected, and must attend, at all times upon the trial of the case, in company with the other jurors. They shall obey the orders of, and be bound by the admonitions of the courts upon each adjournment of the courts; but, if the regular jurors are ordered to be kept in custody during the trial of the cause, such alternate jurors shall also be kept in confinement with the other jurors, and, except as hereinafter provided, shall be discharged upon the final submission of the case to the jury. Such alternate jurors shall be drawn from the same source, in the same manner, and have the same qualifications as the other jurors drawn, and be subject to the same examinations; but shall not retire with the jury of twelve after the case is submitted to it, unless one or two of the jurors shall have died, or in the opinion of the trial judge shall have become ill so to be unable to perform their duty, or discharged for

other legal cause, in which case, the thirteenth juror shall take the place of the first juror becoming incapacitated, and the fourteenth juror shall take the place of the second juror becoming incapacitated. Such juror or jurors, so taking the place of any incapacitated juror or jurors, shall thereafter be deemed to be members of the jury of twelve, and shall have full power to take part in the deliberations of the jury, and the finding of the verdict. Any verdict found by any such jury, having thereon alternates, shall have the same force, effect, and validity as if found by the original jury of twelve.

Where the court allows two alternate jurors in accordance with this act, each side shall have one additional peremptory challenge in the selection of said two alternate jurors."

This Act was held to be constitutional in *Commonwealth vs. Fugmann*, 330 Pa. 4, 28, 198 A. 99. However, in *Commonwealth vs. Krick*, 164 Pa. Superior Ct. 516, 520-21, 67 A. 2d 746, it was held as follows:

"The second assignment is based on a denial of a constitutional right. The trial judge permitted two alternate jurors to retire to the jury room after submission of the case to it. Defendant immediately took exception to this procedure and the alternate jurors were withdrawn ten minutes later. The Act of May 1, 1935, P.L. 127, 17 P.S. Sec. 1153, provides, inter alia, that where in the opinion of the trial judge the case is likely to be a protracted one, two additional jurors may be selected as alternates, with all powers and duties of regular jurors, 'but shall not retire with the

jury of twelve after the case is submitted to it.' Since the alternates are not allowed to participate in the deliberations of the jury, the Act has been held not to violate the constitutional guarantee that the right to 'trial by jury shall be as heretofore, and the right thereof remain inviolate': Commonwealth vs. Fugmann, 330 Pa. 4, 28, 198 A. 99. Whether the alternate jurors were selected at the request of the district attorney or counsel for defendant or by the court's own motion is fundamentally unimportant so long as the alternates were discharged before the deliberations of the original twelve commenced. Commonwealth vs. Spallone, 154 Pa. Superior Ct. 232, 288, 35 A. 2d 727. We have no way of knowing whether the alternates deliberated with the other twelve during those ten minutes or in any way influenced their decision, but we cannot say with fair assurance that the error was harmless. Commonwealth vs. Blose, 160 Pa. Superior Ct. 165, 50 A. 2d 742. To allow the alternates any opportunity to deliberate with the others after the case had been submitted was a direct violation of the Act, and constitutes reversible error. The second assignment is sustained."

In the present case, after the learned Trial Judge completed his charge, he discharged the alternates and then permitted them to have dinner with the jury. Both appellate courts of Pennsylvania (the Supreme Court by way of its per curiam affirmance) stated:

"The Krick case is clearly distinguishable from the present case. Here the trial Court expressly told the jury they were not to begin any deliberations until

> they retired to the jury room. We must assume that the jury followed the court's instructions. In this case the two alternate jurors were actually discharged before the jury retired."

And therein lies a deliberate judicial denial of due process. It is the petitioner's earnest contention that it is a denial of due process for the highest appellate state courts to ignore their own unreversed decision on the construction of the right to trial by jury. The Krick case and the instant case cannot reasonably be distinguished and petitioner has been deprived of the benefit of the Krick decision by the fact that the appellate courts of Pennsylvania have, in essence, simply ignored it. In effecting this denial to petitioner of the benefits of the Krick decision, the appellate courts of Pennsylvania assumed *as a fact* that the former alternate jurors did not discuss the case at dinnertime with the jury. In *Commonwealth ex rel. Darcy vs. Claudy*, 367 Pa. 130 (1951), 79 A. 2d 785, the Supreme Court of Pennsylvania emphatically declared that the practice of interviewing jurors after a verdict and obtaining from them ex parte, unsworn statements was unethical, improper and forbidden by public policy. The petitioner is therefore unable to prove the true facts as to whether or not there were any improper discussions. In the face of this prohibition to counsel the appellate courts of Pennsylvania assumed *as a fact* that the jury obeyed the Trial Judge's instructions not to discuss the case. It is most respectfully submitted that such rule governing the conduct of attorneys coupled with a judicial assumption of a controvertible fact as to which the court could not possibly know anything, is an effective denial to the petitioner of his entitlement to due process of the law.

For each and all of the foregoing reasons, Petitioner respectfully prays therefore that the within Petition be granted.

Respectfully submitted,

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APPENDIX A

(1) OPINION OF THE COURT OF OYER AND TERMINER, AND GENERAL JAIL DELIVERY FOR THE CITY AND COUNTY OF PHILADELPHIA

Levinthal, J.

The five defendants in this case were tried together by a jury before me on charges of lottery, bribery and conspiracy. The jury found two of them, Coleman and Nelson, guilty of bribery, and all five of them guilty of lottery and conspiracy. All defendants have filed motions for a new trial and in arrest of judgment, which were argued before the court en banc, consisting of Judge Eugene V. Alessandroni, Judge Gerald F. Flood, and me. This opinion is filed on behalf of the court en banc.

In Bill No. 861 of August Sessions, 1953, defendant Coleman was charged with setting up and being concerned in an illegal lottery on or about June 16, 1953. The five defendants, Coleman, Curtis, Dixon, Ford and Nelson, were charged, together with twenty-one other persons, in the first three counts of Bill No. 564 of February Sessions, 1954, with setting up and being concerned in an illegal lottery on or about July 1, 1952; in the 4th, 5th and 6th counts of the said Bill, defendant Curtis was charged with setting up and being concerned in an illegal lottery on or about May 4, 1952; in the 7th, 8th and 9th counts, defendant Dixon was charged with setting up and being concerned in an illegal lottery on or about January 27, 1953; and

in the 13th count all five defendants were charged together with four other persons, with conspiracy on or about October 1, 1952, to set up and maintain an illegal lottery.

In the first 12 counts of Bill No. 563, the defendant Coleman was charged, together with one Lowry, with conspiracy to commit bribery and corrupt solicitation of certain police officers, and in the remaining eight counts all five defendants were charged, together with Lowry, with bribery and corrupt solicitation. The Commonwealth elected to try the ten counts charging conspiracy to bribe and bribery and to withdraw the ten counts pertaining to corrupt solicitation.

All the defendants pleaded not guilty to all charges, and in addition defendant Coleman pleaded autrefois convict and autrefois acquit as to the lottery charges. As the prior conviction and prior acquittal pleaded by Coleman were not shown to have been for the identical offenses with which he was charged in this proceeding (since the dates mentioned in the earlier indictments were not the same as those set forth in Bills No. 564 and No. 861), the court properly directed the jury to find for the Commonwealth as to these special pleas. See Commonwealth vs. Bergen, 134 Pa. Super. 62 (1938); Commonwealth vs. Moon, 151 Pa. Super. 555 (1943); and Commonwealth vs. Duerr, 158 Pa. Super. 484 (1946).

The Commonwealth's testimony established that when the police raided premises 5515 Media Street, Philadelphia, on June 16, 1953, they confiscated a tremendous quantity of lottery paraphernalia, including about 8300 banker slips, with about 350,000 number plays, 1013 lead number bets, and 50 tally slips with about 2000 tally numbers. De-

fendant Coleman was found in his underclothes in an upper-story room of the raided premises, and in that room the police confiscated a considerable portion of the seized paraphernalia. Most of the papers seized by the police were undated, but among those found in the room occupied by Coleman were several banker slips dated June 13, 1953 (Exhibit C-1-C, N.T. p. 399). This uncontradicted and unexplained testimony clearly supports the verdict of guilty rendered by the jury as to Bill No. 861 charging Coleman with lottery on or about June 16, 1953.

The Commonwealth further established that when the police raided premises 3815 North 17th Street, Philadelphia, on November 18, 1953, they found in the cellar of that house almost double the quantity of numbers paraphernalia seized in the earlier raid. In addition to about 16,000 banker slips with about 550,000 number plays, and about 75 tapes, 5 adding machines and an aluminum table were confiscated on this occasion. And just as the police forced their way into the rear of the North 17th Street bank, the defendant Ford was caught running down the street from the raided premises. Questioned by Assistant District Attorney Von Moschzisker after his arrest, Ford confessed that he had been working for Coleman in the lottery business for about three and a half years in all, that he had been the manager at the North 17th Street bank for about four days, having gone there on orders from Coleman. Ford told the Assistant District Attorney that it was part of his duty to take to the bank in a paper bag from a can in a nearby alley the number slips which had been deposited in the can by the pick-up men. He would then work at the bank for about two hours each day. He identified certain tally sheets as those containing the

income and expenditures for the very day of the raid. The questions put by the Assistant District Attorney and the answers of Ford were all transcribed by a stenographer, and Mr. Von Moschzisker read the transcript which both he and the stenographer testified was a true and correct record of the interrogation and of the statements made by Ford.

The principal witness for the Commonwealth was Dolores Perry. She testified that she had been employed by Coleman in his lottery business continuously at various successive addresses from the latter part of 1948 until March 8, 1953 (except for about seven months in 1951); that the "hit" or winning number would be determined each day on the basis of the pari-mutuel results of certain horseraces; that it was her duty to examine the slips to see whether they contained the "hit" for the day, and also to make up the tapes that went back to the number writers showing how much each owed the bank.

Mrs. Perry examined the papers that had been confiscated in both raids, and pointed out that identical code letters and figures appeared thereon. She testified that the same code symbols had been used by Coleman's employees when she handled the lottery business for him. She thereupon named the persons represented by the code symbols and identified them as individuals who had worked for Coleman during her term of employment.

She testified that she knew defendant Ford, that he had worked for Coleman's bank at various locations in North and West Philadelphia throughout the time she was similarly employed, that it was his duty to find places to be used as headquarters for Coleman's lottery business, and that Ford also personally wrote numbers for the bank.

As to defendant Nelson, she testified that she knew he had been a writer for Coleman and that the letters "C.N." which appeared on numerous tapes seized in both raids stood for Caesar Nelson, the defendant, and that she had audited Nelson's accounts. As to defendant Dixon, she testified that he had written numbers for Coleman in 1949, but that although she saw Dixon visit Coleman's bank occasionally in 1950 and 1951, she never heard them discuss the numbers business, but only the affairs relating to a cafe which Dixon was operating.

Another witness for the Commonwealth, Andrew Willis, testified that he had originally been in the numbers business for himself; that later, in November, 1952, defendant Dixon suggested that he join with him in the lottery business of Coleman, which was done; and that he and Dixon shared equally from $15 to $25 a week out of the profits of those lottery activities from November, 1952 to September, 1953. He testified as to the location of the banks, and mentioned among others the premises of one Bailey at 135 North Peach Street, and Mrs. Jessie Royall at 5021 Market Street. He also testified that Curtis "did bail" for Coleman in December, 1952.

Still another witness for the Commonwealth, Harry Lowry, testified that he had been part of the Coleman organization from November, 1951 and that Dixon worked for Coleman in his lottery business in January or February, 1952.

Julia Taylor testified that she had worked for one Joe Stockman as a numbers writer; that shortly after she was engaged by Stockman they visited defendant Curtis, and that she was told by both Stockman and Curtis that if she was arrested, they, i.e. Stockman and Curtis, would

obtain her release on bail and pay her fine. She testified also that she picked up numbers from defendant Curtis and other persons during May, 1952; that she was arrested, was released on bail, had the services of a lawyer who was secured by Curtis after Stockman had become a fugitive, and after she told Curtis that if he did not get her a lawyer she would "turn him in." She also testified that some unknown person paid the fine imposed upon her by the court the day after the sentence. She said that she was paid $50 on one occasion by Stockman, and after she was arrested she was paid $25 by defendant Curtis.

Another witness for the Commonwealth, Herman Showers, testified that in 1949 he had worked for one William Webb in the numbers business, and that in the latter part of 1952 he worked for Andrew Willis, both of whom had been identified as part of the Coleman organization. Subsequently, when he had a "hit", he asked Willis to pay him his winnings. Showers testified that Willis told him that Coleman had given him orders not to pay Showers, because Webb owed Coleman some money; that he talked to Coleman directly about the matter, and Coleman told him that he would not pay the "hit" to Showers until the debt of Webb would first be straightened out. Showers also testified that he had an arrangement with defendant Curtis under which the latter would obtain the release of any of Showers' number writers who might be arrested. He testified that he never paid Curtis for these services, although Curtis did secure the discharge on bail or on copies of charge of Showers' employees on from eight to ten occasions. This witness testified further that in June, 1953, when he was taken by certain policemen to a stationhouse on the allegedly false charge that he had numbers in his

automobile, defendant Curtis came to the police station and persuaded him to pay the arresting police some money, and that subsequently he paid the same officers fixed amounts per day "for protection" in accordance with an arrangement negotiated by Curtis.

Alfonso Johnson testified that he worked in the numbers business for William Webb and delivered numbers to Coleman's bank in 1951 and 1952. He also swore that defendant Curtis secured his bail when he was arrested, but he did not pay him for it. Beulah Cummings testified that when she was arrested in November, 1952 for lottery, defendant Nelson gave her the money to pay the fine.

Jessie Royall testified that Andrew Willis leased 5021 Market Street from her for a lottery bank from the last of February, 1952 to June, 1953, for $10 a day, and that she saw defendant Ford at the bank several times.

William Bailey testified that in January, 1953, he rented to defendant Dixon a room on the second floor in his home at 135 North Peach Street, at $10 a day for use as a lottery bank. At the time Bailey and Dixon entered into the verbal lease, defendant Coleman was with Dixon. A few days later the bank was raided, and Mrs. Viola Bailey, wife of William Bailey, was arrested. Dixon was then contacted by Mr. Bailey. Although Mrs. Bailey was released on bail, had the services of a lawyer at her trial, and the fine imposed by the court was paid, neither Mr. nor Mrs. Bailey paid for the bail, the attorney's services or the fine.

It is clear, from the above resume of the voluminous testimony, that the evidence was ample to sustain all the charges against all the defendants on Bill No. 564. Each

of the defendants was shown to have been engaged in lottery activities at or about the times mentioned in the indictment—Coleman, Ford and Nelson continuously over a period of years; Dixon as a numbers writer in January and February, 1952 (Harry Lowry's testimony), in January, 1953 (William Bailey's testimony), and as a partner of a numbers writer from November, 1952 to September, 1953 (Andrew Willis' testimony); and Curtis as a numbers writer in May, 1952 (Julia Taylor's testimony) and as a procurer of bail for the release of arrested numbers writers employed by Coleman and his associates (Julia Taylor's, Andrew Willis', Harry Showers' and Johnson's testimony). It is clear that one who, like Curtis, arranges in advance to give and does give his services to obtain the release from imprisonment of all persons engaged in the Coleman numbers business, when, as and if, they may be arrested, is guilty of being concerned in the maintenance of an illegal lottery and also of conspiracy to set up an illegal lottery.

As to the bribery charges in Bill No. 563, we have the testimony of Harry Lowry that he had worked for Coleman in his lottery business from November, 1951 until 1953. He told of a meeting held in January, 1952 at midnight, when certain named policemen demanded of Coleman, and were promised by him, definite periodic payments in consideration of their not arresting Coleman's numbers writers and pick-up men, and he itemized the bribes he personally paid, in accordance with this agreement, to the several policemen with money received from Coleman's lottery business.

Mrs. Perry testified that the letters "SOL" followed by various amounts which appeared on many of the rib-

bon tapes confiscated in both of the police raids indicated that "protection money" to be paid to policemen was credited to numerous number writers. As to defendant Nelson specifically, Mrs. Perry testified that she ran up Caesar Nelson's book every day and that every Tuesday she made deductions for police protection—"SOL"—in the amount of $700.00 per week, crediting this amount to Nelson's account.

There was no testimony whatsoever connecting defendants Dixon, Ford and Curtis with the bribery of the named policemen, and the trial judge therefore directed the jury to find them not guilty on the various counts in Bill No. 563.

Counsel for Nelson demurred to the evidence and also requested binding instructions on behalf of his client. The trial judge overruled the demurrer and refused to direct a verdict of not guilty. The jury found both Coleman and Nelson guilty as charged in Bill No. 563.

While the evidence against Coleman is clear and convincing, indeed overwhelming, a careful review of the record indicates that the only testimony relied upon by the Commonwealth to establish that Nelson committed bribery was that of Dolores Perry to the effect that the letters "SOL" and figures alongside that symbol represented sums of money credited to the account of Nelson for payment of police protection. The jury was certainly warranted in finding that Nelson received $700.00 a week from the Coleman "bank" for the avowed purpose of paying bribes to policemen. There is, however, no evidence that he actually paid any of that money to the officers. It may well be that Nelson appropriated the $700.00 each week to his own use, and did not give the bribes Coleman expected him to pay

the police. It is contended by the Commonwealth that the jury was warranted in inferring that if the bribes had not been paid, the police would have arrested Coleman's number writers and pick-up men, and that Coleman would not have permitted Nelson to receive such large sums week after week for police protection unless Nelson actually paid the bribes and secured the immunity bargained for. We are of the opinion that although the circumstances are extremely suspicious, they do not measure up to the standard of proof required to overcome the presumption of innocence and establish Nelson's guilt on the bribery charge beyond a reasonable doubt. We therefore sustain Nelson's motion in arrest of judgment as to count 13 in Bill No. 563.

The defendants have assigned 141 reasons in support of their motions. We are satisfied that most of the assignments of error are either trivial or so ruled by precedent as to be removed from the realm of the debatable.

The following six questions raised by defense counsel are worthy of consideration and discussion:

1. *Did the trial judge err in allowing the five defendants and the three indictments to be tried together, and in denying the defendants' motion for a severance?*

The Act of March 31, 1860, P.L. 427, Sec. 40, 19 PS 785, provides that "in all cases in which two or more persons are jointly indicted for any offense it shall be in the discretion of the court to try them jointly or severally . . ." Here all the defendants were jointly indicted in Bills No. 563 and No. 564, and the charge in Bill No. 861 against Coleman is closely related to the offenses charged against the defendants in Bill No. 564. A severance was granted as to another Bill, No. 584, charging the defendant Cole-

man with carrying a concealed deadly weapon, because that charge was not related to the offenses charged against the other defendants and it would have been prejudicial to them to have Bill No. 584 tried together with the other indictments. But where, as here, there was a conspiracy charge and the separate offenses were similar and interrelated, the proper practice is to consolidate the trial of the indictments.

In Commonwealth vs. Weiner and Zvon, 148 Pa. Super. 577 (1942) at p. 583, it was said:

> "The next proposition advanced is that the learned trial judge erred in consolidating all the indictments for trial. While the crimes charged were separate offenses, they were closely related having grown out of the alleged conspiracy. The court followed the usual practice of consolidating the indictments charging offenses committed in consummation of a corrupt agreement: Commonwealth vs. Cauffiel, 97 Pa. Superior Ct. 202. The trial judge can best determine whether a number of bills of indictment should be consolidated and the discretion he exercises concerning that matter will not be reversed unless it is made clear to us that the rights of the defendants have been prejudiced thereby: Commonwealth vs. Tracey, 137 Pa. Superior Ct., 221, 8 A. 2d 622. See, also, Commonwealth vs. Quinn, 144 Pa. Superior Ct. 400, 406, 19 A. 2d 526. The judge was entirely warranted in this instance, where all the evidence that was admissible on the crimes charged in the other indictments tended to support the conspiracy charge, in ordering a joint trial."

2. *Did the trial judge err in denying the defendant's motions to continue the trial and for a change of venue because of newspaper publicity concerning the discharge from the police force at the commencement of the trial of the officers alleged in Bill No. 563 to have been bribed by the defendants?*

In the midst of the voir dire examination of the panel, after six jurors had already been tentatively accepted for service, the defendants moved for a continuance of the trial and for a change of venue. The motions were based upon the contention that extensive newspaper publicity appearing that morning and the night before made the securing of an impartial panel impossible. Complaint was made particularly about the timing of the discharge by the Police Commissioner of the five officers named in the bribery indictment against the defendants. It was alleged that the purpose of the discharge simultaneously with the commencement of the trial was to secure sensational press publicity and thus prejudice the jury against the defendants.

After a careful and thorough inquiry as to whether any of the panel had actually been influenced by the press publicity, the motions were denied. It was found that each juror, according to the sworn testimony given on the voir dire, was one who either had not read the newspaper accounts at all or had not been influenced by them. Of the twelve jurors and two alternates, ten had read nothing whatsoever about the case; two had not recently (within two weeks for one, two months for the other) read anything about it; one had read the previous night's headlines, but had formed no opinion; and one had read an entire article in the newspaper with respect to the dis-

charge of the police officers, but had no opinion as a result of such reading.

It should be noted that not only were the jurors all locked up throughout the eight days of the trial, but that each member of the panel tentatively accepted for service as a juror during the voir dire was also locked up, and thus prevented from reading any newspapers. Moreover, the defendants were permitted considerably more peremptory challenges than they were technically entitled to exercise under the Act of March 31, 1860, P.L. 427, Sec. 40, 19 PS 785. The defendants were allowed six such challenges each, or a total of thirty, whereas the statute provides that they were all jointly entitled to six peremptory challenges. In Commonwealth vs. Deutsch, 72 Pa. Super. 298 (1919), at pp. 308 and 309, this statute is declared constitutionally unassailable. See also Commonwealth vs. Antico, 146 Pa. Super. 293 (1941), at p. 313.

Despite the trenchant dissenting opinion of Mr. Justice Frankfurter in Stroble vs. State of California, 343 U. S. 181 (1952), it is well settled that newspaper articles giving publicity to the crime charged against the accused or to matters connected with the prosecution are not alone sufficient to show prejudice warranting a continuance of of the trial or a change of venue. Even when the newspaper articles are inflammatory or denunciatory of the accused, or intimate that he is guilty, they are not sufficient evidence of the existence of such prejudice as will justify a continuance or change of venue. The examination of the jurors on their voir dire has been frequently held to be the best test as to whether local prejudice exists and whether the public mind has been so inflamed against the

defendant that a fair and impartial trial cannot be had. See 22 C.J.S. pp. 313, 314 and 315, and cases cited.

In U. S. vs. Leviton, 193 Fed. 2d 848 (1951), where a copy of a newspaper containing a *false* report concerning the case on trial was actually found in the jury room, a majority of the U. S. Circuit Court of Appeals nevertheless sustained the trial court's refusal of a new trial. The court said, at p. 857:

> "We do not think, however, that such a report, erroneous as it was, made a fair trial impossible. The judge gave very explicit instructions that the contents of the article were to be disregarded and went on to point out how the offenses set forth in the indictment differed from those described in the article. Trial by newspaper may be unfortunate, but it is not new and, unless the court accepts the standard judicial hypothesis that cautioning instructions are effective, criminal trials in the large metropolitan centers may well prove impossible."

In Commonwealth vs. Deutsch, supra, it was held that it was not error for the trial judge to refuse to continue a conspiracy trial in which the jury were not locked up and where newspaper reports of the testimony made violently derogatory comments about the chief witness for the defense. The court said, at p. 316:

> "We think it is asking the court to take a long step when we are urged to set aside this verdict, on the ground that the jurors may have been improperly influenced by reading the article complained of, if in fact they read it. That there is such a possibility no one of course can deny. But we are not convinced

that any fair probability of it has been made to appear which would justify us in taking the action urged upon us. If we are to continue to have faith in our jury system, it must rest on the belief that when men of average intelligence and integrity have solemnly sworn to be guided in their deliberations by the evidence produced and that alone, there will be enough of firmness and stability of mind on their part to prevent them being swerved from the line of their duty by the vague unsworn statements of any one, who does not share the responsibility which has been assumed by the jurors themselves. But it may be said that the preservation of the dignity of the courts would be imperiled if the trials are to be attended with such incidents. We think not. The real dignity of the courts must have its roots in the ability and integrity of the judges who preside therein and the fearlessness and impartiality with which they exercise their powers. It is not an exotic plant which can bloom only in the artificial atmosphere of a hothouse. There is therefore, in our opinion, nothing in that consideration to warrant our interference with the judgments in question."

In the instant case, the jurors *were* locked up, the newspaper publicity relating to the discharge of the policemen was not false, but true, and it was clearly established that the jurors were not influenced in the slightest degree by the press reports. Complaint is made that the trial judge improperly dismissed the defendants' petition for leave to take testimony to try to establish the truth of their allegation that the discharge of the police was deliberately timed at the commencement of the trial in order to prejudice the jury against the defendants by securing

sensational press publicity. It should be pointed out that this petition was filed after the trial had been completed and the verdicts rendered. Furthermore, the trial judge had convinced himself that the jurors had not been influenced at all by the publicity, and that they had considered the case without any prejudice against the defendants by reason of the newspaper accounts of the discharge of the police. Indeed, the failure of the Police Commissioner to discharge the officers promptly, after they had been named in Bill No. 563 as the alleged receivers of bribes, and his unexplained action in discharging them at the beginning of the trial, weakened rather than strengthened the Commonwealth's case against the defendants on the bribery charges.

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3. *Did the trial judge err in his rulings on the admissibility of the Commonwealth's evidence?*

(a) It has been strenuously argued on behalf of defendant Ford that Mr. Von Moschzisker should not have been permitted to read the transcript of the interrogation of Ford, but should have been required to testify solely from his recollection of his conversation. There is no merit to this contention. The applicable rules of evidence are clearly set forth in Christian Moerlein Brewing Co. vs. Rusch, 272 Pa. 181 (1922), at p. 187:

> "Where a witness has a present recollection of a past event although his memory is refreshed by a memorandum made at the time of the event, he testifies from such recollection; but where he has no present recollection of such past event, even when aided by his memorandum, the latter itself may be offered

in evidence, on proof by the witness of his knowledge of its accuracy when made and that it was made when the transaction was fresh in his mind . . . in Heart vs. Hummel, 3 Pa. 414, 415, Chief Justice Gibson, speaking for the court, says, 'It is fallacious to suppose that the law prefers memory to writing for the preservation of evidence; or that a memorandum which fails to move the memory of him who made it, cannot be introduced as independent proof, preceded by his oath, of its accuracy when it was written.' "

(b) It is also argued that the trial judge erred in overruling the defendants' objections to the admission of conversations between various alleged conspirators in the absence of all or some of the defendants. Specifically, one of the principal objections is to the testimony of Harry Lowry relating his conversations, in the absence of defendant Coleman, with the police officers who were members of the alleged bribery conspiracy, although they were not indicted. It is well settled that a conspirator need not be under indictment for conspiracy, and *a fortiori* need not be a defendant in the case, before his declarations as a conspirator may be admitted into evidence. In Commonwealth vs. Schaeffer, 149 Pa. Super. 51 (1942), it was said, at p. 54:

"It is true that the general rule is that the statements are only admissible against the party who makes them, but where, as here, there is proof of a combination between several persons for an unlawful purpose, any act done by one party in pursuance of a concerted plan with reference to the crime charged, is the act of all and the proof of such act is evidence against any and all of the others who were engaged

in the unlawful common plan and design: Wharton's Criminal Evidence, Section 698, p. 1430. This rule applies notwithstanding the indictments do not charge a conspiracy: Com. vs. Biddle, 200 Pa. 640, 50 A. 262; Com. vs. Spardute, 278 Pa. 37, 49, 122 A. 161; 22 D.J.S. 1293, Sec. 756."

In Commonwealth vs. Ott, 154 Pa. Super. 647 (1944), the Superior Court said, at p. 653:

"The declarations of one conspirator, made to third parties in the absence of his co-conspirator, are admissible in evidence against both if the declarations were made during the existence of the conspiracy and in furtherance of the common design, for they form a part of the fraudulent transaction: Com. vs. Jermyn, 101 Pa. Superior Ct. 455; Com. vs. Strauss, 89 Pa. Superior Ct. 82; Com. vs. Deutsch, 72 Pa. Superior Ct. 298; Com. vs. Bingle, 62 Pa. Superior Ct. 105."

It is obvious that the testimony complained of, whether it be relating to conversations of Lowry or any other conspirator, including the police officers involved in the bribery, whether they be under indictment or not, and whether they were in the presence of some or none of the defendants tried in this case, was admissible. We have here a conspiracy among not only the defendants on trial, but including also other individuals, some of whom were not under indictment. The acts, including statements, of each of these conspirators during the existence of the conspiracy and in furtherance of it, are the acts of every other conspirator, and are admissible in evidence against all the other conspirators.

(c) As to the statements of defendant Ford, elicited by the interrogation conducted by Mr. Von Moschzisker,

it should be noted that this evidence was admitted by the trial judge as applying solely to defendant Ford. Although Coleman was mentioned by Ford in his confession, the jury was instructed to disregard the reference "as any evidence whatsoever against Coleman." This was because the statement of Ford was made after his arrest, and therefore after the conspiracy had ended, and what he was saying was not in pursuance of the conspiracy. In Commonwealth vs. Novak, 165 Pa. Super. 576 (1949), at p. 581, it was said:

> "Our appellate courts have said that a confession is evidence only against the person who made it and will not be admitted to affect others who participated in the crime. Com. vs. Epps, 298 Pa. 377, 148 A. 523; Com. vs. Martin, 124 Pa. Superior Ct. 293, 299, 300, 188 A. 407. However, in the case of a joint trial, a confession may be admitted against the party making it, the trial judge being careful to protect the codefendants' rights by proper cautionary instructions to the jury. Com. vs. Hudson, 269 Pa. 176, 112 A. 434; Com. vs. Farrell, 319 Pa. 441, 444, 181 A. 217; Com. vs. Berman, 119 Pa. Superior Ct. 315, 329, 181 A. 244. Whether the prejudice resulting from the introduction of a confession implicating several defendants on a joint trial can be nullified by proper instructions to the jury is a question for the trial judge in the exercise of a sound discretion. Com. vs. Dolan, 155 Pa. Superior Ct. 453, 459, 38 A. 2d 497. Further, when a trial judge admits evidence and at the same time, or later in his charge, instructs the jury that such evidence is 'not any measure of proof of a defendant's guilt or innocence,' it must be taken for granted that the jury obeys the instruction and that therefore the admission

of what was legally inadmissible evidence was harmless error."

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4. *Did the trial judge err in overruling the objections to remarks made by the Assistant District Attorney in the course of the trial?*

The standard by which a court should test remarks made by a prosecutor during the course of a trial to determine whether because of such remarks a mistrial should be granted was clearly stated by our Supreme Court in Commonwealth vs. Meyers, 290 Pa. 573 (1927) at p. 581, and frequently repeated in subsequent cases whenever the issue arose:

> "Where under all the circumstances of the case, the verdict rendered is a just one, the language of the prosecuting officer which will justify a reversal must be such that its unavoidable effect would be to prejudice the jury, forming in their minds a fixed bias and hostility toward the defendant, so that they could not fairly weigh in his behalf such circumstances of doubt, extenuation or degree of guilt that may be present in the case, and thus make them unable to render a true verdict."

See also Commonwealth vs. Wilcox, 316 Pa. 129 (1934); Commonwealth vs. Crittenton, 326 Pa. 25 (1937); and Commonwealth vs. Davison, 99 Pa. Super. 412 (1930).

In an exhaustive opinion by Judge Keller in the Superior Court which was adopted by the Supreme Court of Pennsylvania in Commonwealth vs. Wilcox, supra, the application of the standard set forth in the Meyers case is illustrated by a number of cases where remarks made by

the prosecutor, much stronger than anything said in the instant case, were held insufficiently prejudicial to require the granting of a new trial. Examples of such remarks discussed in the Wilcox case, at p. 143, are:

> "A typical gunman's defense" (Commonwealth vs. DelVaccio, 299 Pa. 547, 554 (1930));
>
> "Defense was cooked up" (Commonwealth vs. Massarelli, 304 Pa. 335, 339 (1931));
>
> "The prisoner didn't have the heart of a man or the soul of a man" (Commonwealth vs. Smith, 270 Pa. 583, 586 (1921));
>
> "I will ask you to say that they (eyewitnesses who had fled the jurisdiction) are staying away from this jurisdiction for the purpose of helping this criminal" (Commonwealth vs. Touri, 295 Pa. 50, 57 (1929));
>
> "The defendant might be called a skunk" (Commonwealth vs. Davison, 99 Pa. Super. 412 (1930)).
>
> "After all, whether or not the judgment will be reversed because of the remarks of the district attorney depends not only on the remarks themselves but also on the attitude of the court following objection and the probable effect as reflected in the verdict of the jury. . ."

A realistic appraisal of this question was made by the Superior Court in Commonwealth vs. Sarves, 17 Pa. Super. 407 (1901), at p. 411:

> "While the printed record indicates that in the contest before the jury excessive earnestness on the part of contending counsel was displayed, and expres-

sions of very doubtful professional propriety were used, yet it is not clear that the manner of trial injuriously affected the defendant. Such forensic displays rarely affect the deliberate judgment of a jury, and in this case they were conducted under the supervision of the trial judge who fully guarded the rights of the defendant in a temperate and impartial charge."

In Commonwealth vs. Grosso, 169 Pa. Super. 606 (1951), the Superior Court referred to the remarks of the district attorney which were objected to by defense counsel as follows, at page 611:

"The retort of the Commonwealth's attorney was ill-advised but it was not ground for the withdrawal of a juror. He referred to incompetent evidence of other pending prosecutions of this same appellant on similar charges known to counsel to which defendant would have objected strenuously, and properly so, if offered. The remark objected to was invited by an improper argument by defense counsel and appellant therefore may not complain, especially in the light of the court's admonition to both counsel to confine their arguments to the evidence in the case."

In the recent case of Commonwealth vs. Nelson, 172 Pa. Super. 125 (1952), (reversed on other grounds), a case involving a prosecution under the sedition law of Pennsylvania and containing many emotional clashes between counsel, the Superior Court stated as follows, at page 148:

"Complaint is also made of heated and inflammatory remarks being made by witnesses and the district attorney. An examination of the record indicates that many times they were due to provocation by defendant. It also shows that the Trial Judge ad-

monished both sides and their witnesses without distinction and that the jury was instructed to eliminate such remarks and altercations from their consideration of the case."

In the instant case, counsel for defendant Dixon objected to remarks made by the Assistant District Attorney such as the following during the examination of the witness William Bailey:

> "Mr. Crippins: He would only be a Democrat because the Democrats are in, Mr. Witkin, after 69 years of misrule." (p. 932 of N.T.)

But it is to be noted that counsel for defendant Dixon, prior thereto, in the course of a few minutes, repeated not less than nine times that the witness had been given a job by a Democratic official. This situation falls within the rule that the defense may not complain of an improper remark elicited by himself from the District Attorney.

Another remark objected to was the statement by the Assistant District Attorney that certain witnesses were not being called because, "We want them to live after this is over." Again, this was elicited by the introduction of defendants' Exhibit F which contained a statement that the witness Dolores Perry was in fear of her life because of her connection and knowledge of defendant Coleman's business. This statement was therefore based on evidence of record introduced by the defendant himself.

Furthermore, it is a matter of record that the trial judge never failed, after every heated exchange between counsel, to warn the jury to disregard any such remarks and to judge the case solely on competent evidence produced by them.

5. *Did the trial judge err in recording the verdict of guilty as to defendant Dixon on counts* 1, 2, 7, 8 *and* 13 *of Bill No.* 564?

It is contended by counsel for defendant Dixon that the verdict as against him was improperly recorded by the trial judge. It is claimed that there was a disagreement of the jury, because during its polling the tenth juror first stated that she found Dixon not guilty, and later was confused in stating that she found Dixon not guilty on the counts as to which all the other 11 jurors had found him guilty, and guilty on those counts as to which the other jurors had found him not guilty. The juror finally made clear what she intended to say, and the verdict was recorded in accordance with her and her fellow-jurors' finding.

It should be recalled that a considerable number of counts appeared in the three bills of indictment, that the trial judge instructed the jury to ignore certain counts which did not refer to the defendants and to render verdicts of not guilty as to some of the defendants with reference to certain other counts, and that a total of more than 25 counts were actually passed upon by the jury. During their deliberations and shortly before the rendition of their verdict, the jury requested the judge to send to the jury room some paper on which they might record their detailed findings. This was done.

The foreman of the jury read from a slip of paper in his hand the verdict as to each count in each of the three bills submitted to the jury for its consideration. The defendants thereupon asked for a poll of the jurors as to each individual count. The hour was late, and the detailed poll was long-drawn and tedious. Each juror read from a slip of paper in his or her hand, as the verdicts were indi-

vidually pronounced. The 10th juror, manifestly fatigued and confused obviously misread what appeared on the paper in her hand with regard to Dixon. The confusion was finally cleared away when the trial judge, addressing Juror No. 10, said:

"Tell us what you mean Juror No. 10. He is not guilty—

The Court: Of what?

Juror No. 10: 3 and 9.

The Court: What is he guilty of?

Juror No. 10: 1, 2, and 7, and 8 and 13.

The Court: That will be recorded."

It would be a travesty of justice to declare that the verdict against Dixon was improperly recorded merely because a juror was permitted to correct the statement originally mistakenly made by her during the polling of the jury. As the trial judge properly said, it is the duty of the court to record what the juror "means and not what she mistakenly says."

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6. *Did the trial judge err in permitting the two alternate jurors, following the completion of the trial, to have dinner with the twelve jurors, with the explicit instructions that there should be no discussion of the case or any deliberations until the twelve jurors alone retired to the jury room?*

Relying upon the decision in the case of Commonwealth vs. Krick, 164 Pa. Super. 516 (1945), defense counsel contend that the court erred in permitting the two alternate jurors to have dinner with the rest of the jury im-

mediately after the completion of the trial. It is clear from the record that the judge did not allow the two alternates to retire with the jury for deliberation. What actually occurred appears in the notes of testimony at page 1273, as follows:

> "The Court: . . . We will adjourn court until 9:30. Members of the Jury, don't rush to any verdict. You will have your dinner now, *and then you will come to the jury room for your deliberations.*
>
> "As you retire, I want to thank the two ladies who served as alternates for their patience and their endurance. However, their services will no longer be required on this jury. I am sure they will be interested in the outcome that will be arrived at by their colleagues in the jury box. *The two alternates will have dinner with the rest of the jury. Then the jury will retire, with the twelve jurors going into the jury room. Do not discuss the case until you retire to the jury room. The court will reconvene at* 9:30." (Emphasis supplied).

The case of Commonwealth vs. Krick, supra, properly held that it was error to allow alternate jurors to retire to the jury room to deliberate with the jury, even though the alternates were withdrawn after they had been in the jury room only about ten minutes. The Superior Court, in holding this to be error, said that the alternate jurors are permissible "so long as the alternates were discharged *before the deliberations of the* original twelve commenced."

The situation in the instant case is completely different. Here the trial judge expressly told the jury that they were not to begin any deliberations until they retired to the jury room. This followed numerous similar warnings dur-

ing the preceding days when the court repeatedly admonished the jury not to discuss the case during meal time or over night. It must be assumed that the jury heeded the court's instructions. It should not be speculated that at this particular dinner time, as distinguished from any other meal time or bedtime, the jurors violated the court's admonitions. The fact in this case is that the two alternate jurors were discharged before the jury retired and before any deliberation commenced.

In conclusion, we repeat that we are completely satisfied that the defendants were fairly tried and properly convicted.

The motions for a new trial are dismissed. Except for the granting of Caesar Nelson's motion in arrest of judgment with reference to count 13 in Bill No. 563, as hereinbefore mentioned, all other motions in arrest of judgment are also dismissed.

It is hereby ordered that the defendants appear in Courtroom 696 in City Hall, on Tuesday, November 9th, 1954, at 10 a.m., at which time sentence will be imposed.

By the Court,
L. E. L., *J.*

(2) OPINION OF THE SUPERIOR COURT

Opinion by Ervin, J. Filed: July 21, 1955

This is an appeal from the sentence of Roy Dixon for the crimes of lottery and conspiracy to commit lottery. Dixon was jointly indicted on bills of indictment Nos. 563 and 564 of February Sessions, 1954, with four other defendants, Caswell Curtis, Joseph Ford, Ceasar Nelson and Leo Coleman. In bill of indictment No. 563 the defendants were charged with conspiracy to commit bribery and corrupt solicitation of certain police officers and with bribery and corrupt solicitation. The defendant was acquitted on this indictment. In bill of indictment No. 564 the defendants were charged in the first count with erecting, setting up, opening, making and drawing of a lottery on July 1, 1952; in the second count with being concerned in the management, conducting and carrying on of a lottery on July 1, 1952; in the third count with having in their possession with intent to sell and unlawfully selling lottery and numbers policy on July 1, 1952; in the seventh count the defendant was individually charged with erecting, setting up, opening, making and drawing a lottery on January 27, 1953; in the eighth count the defendant is individually charged with being unlawfully concerned in the management, conducting and carrying on of a lottery on January 27, 1953; in the ninth count the defendant was individually charged with having in his possession with intent to sell and unlawfully selling lottery and numbers policy on January 27, 1953; and in the 13th count defendants were charged with conspiracy to set up, make, open and draw a lottery for moneys, and to be concerned in the management, conducting and carrying on of the same, and to have

in their possession with intent to sell and to unlawfully sell lottery policies and tickets on or about October 1, 1952. In addition the defendant Leo Coleman alone was indicted in bill of indictment No. 861 of August Sessions, 1953 for setting up an illegal lottery. Dixon was convicted on counts 1, 2, 7, 8 and 13 of indictment No. 564 and found not guilty as to counts 3 and 9 of the same indictment. Defendant was sentenced on counts 1, 2 and 3 of indictment No. 564 to not less than six months nor more than one year in the Philadelphia County Prison and on count No. 13 to not less than three months nor more than eleven months in the same prison to begin at the expiration of the sentence imposed on counts 1, 2 and 3.

The arguments presented on appeal will be disposed of in the same order as argued.

The defendant argues that bills of indictment No. 861 August Sessions, 1953 and Nos. 563 and 564, February Sessions, 1954, should not have been consolidated for trial. He also contends that his motion for severance of the trials of the several defendants should have been granted. We agree that the trial court's ruling in favor of the Commonwealth on both of these points was not error. These matters were within the discretion of the trial judge. Com. v. Novak, 165 Pa. Superior Ct. 576, 69 A. 2d 186, cert. den. 339 U. S. 924, 70 S. Ct. 615, 94 L. Ed. 1346. This is especially true "where all the evidence that was admissible on the crimes charged in the other indictments tended to support the conspiracy charge . . ." Com. v. Weiner and Zvon, 148 Pa. Superior Ct. 577, 25 A. 2d 844; Com. v. McCord, 116 Pa. Superior Ct. 480, 176 A. 834; Com. v. Mulroy, 154 Pa. Superior Ct. 410, 36 A. 2d 337. See also Com. v. Quinn, 144 Pa. Superior Ct. 400, 19 A. 2d 526, where we

said: ". . . the testimony showed a *general course of conduct* . . . all tending to the same general end."; Com. v. Ackerman, 176 Pa. Superior Ct. 80, 106 A. 2d 886. Com. v. Schmidheiser, 111 Pa. Superior Ct. 283, 169 A. 572, and Com. v. Dauphinee, 121 Pa. Superior Ct. 565, 183 A. 807, are distinguishable from the present case in that no conspiracy is charged in either of those cases.

It is also argued by the appellant that the lower court erred in refusing the several motions for the withdrawal of a juror based upon improper remarks of the assistant district attorney who tried the case. We have read the entire record carefully and are not convinced that the remarks had the unavoidable effect of so prejudicing "the jury, forming in their minds a fixed bias and hostility toward the defendant, so that they could not fairly weigh in his behalf such circumstances of doubt, extenuation or degree of guilt that may be present in the case, and thus make them unable to render a true verdict." Com. v. Meyers, 290 Pa. 573, 581, 139 A. 374.

Of the seven counts against the defendant in indictmentment No. 564, he was acquitted of two. If the jury were prejudiced, they would not have been so discriminating and undoubtedly would have rendered guilty verdicts on all counts. As to the two remarks most seriously complained of, defendant's counsel, by his prior remarks, provoked the remarks. This opinion will not be unduly lengthened by referring to the record except to point out that defendant's counsel at least 10 times referred to "Republicans" or "Democrats" before the assistant district attorney stated: "He would only be a Democrat because the Democrats are in, Mr. Witkin, after 69 years of misrule." The court, upon denying the motion for the withdrawal of

a juror, immediately made the following statement to the jury: "The jury will be strongly urged to ignore completely all references to Republicans and Democrats. We are here as Americans. We are not concerned with the party allegiance of any of the witnesses or any of the defendants or any of the persons referred to." This statement of the court must have produced the desired result else guilty verdicts would have been found by the jury on all counts and all indictments.

As to the other remark of the assistant district attorney seriously complained of by the defendant, defendant's counsel sought to have a letter read to the jury for the purpose of showing that a witness by the name of Buddy Mitchell had been brought from Georgia by the Commonwealth but had not been called as a witness. Defense counsel stated: ". . . there must be some reason why they have not called him." The assistant district attorney then informed the court why this witness had not been called and said: ". . . and I can assure Mr. Witkin that there are certain other witnesses who were questioned for weeks who were not called here, again for security reasons." He further stated: "They were sitting here in this courtroom and were not called because we want them to live after this is over." The court denied the motion for the withdrawal of a juror and stated: "I will say to the jury that I caution you very urgently to ignore the last few words spoken by Mr. Crippins. They were not in order and it is not evidence. It is not a proper issue in this case." This, in our opinion, removed any prejudice from the minds of the jurors. The letter itself, which had been read to the jury, specifically referred to the fact that Mrs. Perry, one of the witnesses, fled from Philadelphia because of fear of arrest

and "in fear of her life." It further pointed out that when she was brought back to Philadelphia she was "still terrified and afraid." The jury knew from the evidence already placed in the record with defense counsel's approval that this witness was terrified, afraid and in fear of her life. We doubt that any additional prejudice would arise from the statement of the assistant district attorney that other witnesses were in fear.

It is contended that the trial judge was prejudiced and that the sentencing of the defendant, Roy Dixon, when compared with the sentences imposed on the other defendants, shows such prejudice. We have carefully read the entire record, having this charge in mind, and are convinced that the trial judge was not only fair but was lenient in the sentence imposed upon this defendant. The sentencing of a defendant is a matter which is committed to the sound discretion of the trial judge. An appellate court should not interfere with this function which the legislature has wisely committed to the trial judge. In this case the trial judge properly took into consideration the fact that the defendant had an important position in the political life of the community and owed an obligation to respect the office that he held. Not only did this defendant commit a crime against the Commonwealth but at the same time he did a great wrong to many other people honestly engaged in political activity. Such conduct contributes to the common belief that all politicians are corrupt and dishonest. The lower court also took into consideration the prior record of the defendant as well as his service in the armed forces.

Was there sufficient evidence to sustain the conviction of the defendant on counts 1, 2, 7 and 8 of indictment No. 564? Sentence was not imposed on counts 7 and 8 and

they need not be considered here. The chief complaint of the appellant is that his conviction cannot be sustained unless the Commonwealth proved the commission of the crime on July 1, 1952. Counts 1, 2 and 3 of indictment No. 564 charged that the offense occurred "on July 1, 1952 and on divers other days and times within two years last past before the finding of this inquisition . . ." The assistant district attorney asked the court to strike out as mere surplusage "and divers other days and times." The court granted the motion. The Commonwealth is not restricted to proof of the crime on the exact date stated in the indictment. In Com. v. Levy, 146 Pa. Superior Ct. 564, 569, 23 A. 2d 97, we said: "It may be conceded that in the prosecution of crimes of the kind here involved the Commonwealth is not required to prove their commission on the date laid in the indictment, but, failing in that, we think it has the burden, in order to sustain a conviction, of proving their commission upon some other date, fixed with reasonable certainty and being within the prescribed statutory period . . ." See also Com. v. Dingman, 26 Pa. Superior Ct. 615, 620; Com. v. Gaber, 162 Pa. Superior Ct. 538, 540, 58 A. 2d 592; Com. v. Mourar, 167 Pa. Superior Ct. 279, 281, 74 A. 2d 734; Com. v. Gipe, 169 Pa. Superior Ct. 623, 626, 84 A. 2d 366. Indictment No. 564 was presented to the grand jury and a true bill found on February 11, 1954. The jury could properly consider and convict upon any evidence that showed commission of the crime or crimes charged within two years prior to February 11, 1954. The Act of 1860, March 31, P. L. 437, §77, 19 PS §211. A review of the evidence will show that in November, 1952, at defendant's instance, A. B. Willis began giving his numbers business to Coleman and continued to do so until September, 1953, paying to the defendant some weeks "$15, some weeks $25 may-

be a little more, perhaps a little less"; Willis and defendant discussed the locations of numbers banks in the 44th Ward, of which defendant was Republican ward leader, during this period of time. William Bailey testified that on January 25, 1953 he rented the middle room of the second floor of his premises at 137 North Peach Street in Philadelphia to the defendant and Clee Coleman for the use of numbers at a rental of $10.00 a day and that they operated in the room thereafter and that he saw adding machines there; that his wife was arrested when a raid was made on January 26, 1953; Viola Bailey, the wife, testified that the defendant induced her to swear falsely at the preliminary hearing to the effect that she had rented the room in question to a man by the name of Johnson; at the trial of the defendant she refuted her prior testimony and denied renting it to Johnson. Harry Lowry testified that the defendant worked for Coleman in January and early February of 1952 and that he heard the defendant discussing with Coleman the numbers business in West Philadelphia and Chester. There is other evidence but the specific reference to the above testimony is suffcient to show that there was sufficient evidence produced by the Commonwealth to convict the defendant of the commission of the crime on reasonably specific dates within the two year period preceding the exhibition of the bill of indictment to the grand jury on February 11, 1954.

The 13th count in indictment No. 564 charged the commission of the crime of conspiracy to commit lottery "on or about October 1, 1952". Without specifically referring to the evidence, we have reviewed the record and are convinced that there was sufficient evidence to justify the verdict of guilty on the conspiracy charge.

Appellant further contends that the trial court erred in permitting the two alternate jurors to retire with the jury panel following the completion of the trial and in permitting them to have dinner with the jury. In that connection the court said: "Members of the Jury, don't rush to any verdict. You will have your dinner now, and then you will come to the jury room for your deliberations.

"As you retire, I want to thank the two ladies who served as alternates for their patience and their endurance. However, their services will no longer be required on this jury. I am sure they will be interested in the outcome that will be arrived at by their colleagues in the jury box. The two alternates will have dinner with the rest of the jury. *Then the jury will retire, with the twelve jurors going into the jury room. Do not discuss the case until you retire to the jury room.*" (Emphasis added)

In Com. v. Krick, 164 Pa. Superior Ct. 516, 520, 67 A. 2d 746, we held that it was error to allow alternate jurors to retire to the jury room with the jury. In that case the court allowed the alternates to retire to the jury room to deliberate with the jury and upon exception by counsel they were withdrawn after they had been in the jury room approximately 10 minutes. We said in the Krick case: "To allow the alternates any opportunity to deliberate with the others after the case had been submitted was a direct violation of the Act, and constitutes reversible error." The Krick case is clearly distinguishable from the present case. Here the trial court expressly told the jury they were not to begin any deliberations until they retired to the jury room. We must assume that the jury followed the court's instructions. In this case the two alternate jurors were actually discharged before the jury retired.

Complaint is also made by the appellant that the reception and recordation of the verdict of juror No. 10 was in error. Defense counsel requested that the jury be polled before the verdict was recorded. Juror No. 10, in rendering her individual verdict as to bill No. 564 for the defendant made a mistake as to certain counts of the bill but promptly corrected the mistake by stating what she actually meant. As thus corrected her individual verdict was in agreement with the verdict which had previously been announced by the jury. In Com. v. Minoff, 363 Pa. 287, 297, 69 A. 2d 145, the Supreme Court said: "However, if there is a mistake in the verdict as orally given by the jury in open court, it may be corrected until officially recorded. In Walters v. Junkins, 16 S. & R. 414, 415, this court said, 'After the jury have rendered their verdict, it is read to them, that they may say, whether the court have recorded it according to their finding. If any mistake should have occurred, it may be immediately corrected.'" See also Com. v. Martin, 379 Pa. 587, 109 A. 2d 325. It is urged by appellant that the trial judge improperly influenced the juror in the rendition of her verdict. A reading of the record will show the fallacy of this statement. The juror really corrected her own mistake and eventually brought herself into complete accord with the verdict as previously announced. All of this was done before the verdict was recorded.

Appellant also complains that he was improperly sentenced on count 3 of the indictment No. 564. The jury had acquitted him on this count. The judge in sentencing lumped counts 1, 2 and 3. Since the trial court did not specifically sentence on any one of the three counts, it is a valid sentence on counts 1 and 2. See Com. v. Waychoff, 177 Pa. Superior Ct. 182, 110 A. 2d 780.

The appellant also complains of the refusal of the trial judge to charge the jury that conspirators may not corroborate each other and relies upon Com. v. Simon, 44 Pa. Superior Ct. 538, in support of his position. We held in that case that the lower court erred in instructing the jury that the testimony of one of the accomplices "of course is very positive corroboration, if you believe it." The trial judge made no such statement in the present case but stated to the jury: "Consider also the fact that these people are admitted accomplices. They tell you that they were engaged in these law violations. How much weight do you give to the testimony that comes from a polluted source, that comes from a corrupt source? Consider the convictions for serious offenses. How much weight do you give to the testimony of people who are convicted felons?

"I should say to you that you should scrutinize with care and with caution the testimony of accomplices who come into Court, admit that they were law violators, and involve others as being guilty of the same offenses, because it is a polluted source from which we are getting this testimony.

"But that does not mean that a Jury may not convict on the testimony, even of one such polluted and corrupt witness, because it is common sense that a person may be a villain as to many other matters, and still be telling the truth as to the pivotal issue which you, as the triers of the facts, have to determine, and that is the guilt or innocence of the defendants."

The charge correctly set forth the law as to accomplices.

Appellant also complains that the trial court erred in failing to caution the jury concerning certain money paid

to Commonwealth's witnesses by the district attorney's office. Without specifically referring to the charge of the lower court in this connection, suffice it to say that the jury's attention was expressly called to the fact that they had received this money and that they could consider that in considering "their interest and their bias."

The judgment of sentence is affirmed and the defendant is directed to appear in the court below at such time as he may be there called, and it is ordered that he be by that court committed until he has complied with the sentence, or any part of it, which had not been performed at the time the appeal was made a supersedeas.

Gunther, J. dissents.

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(3) OPINION OF THE SUPREME COURT

Per Curiam, filed: January 5, 1956.

The judgment of the Superior Court is affirmed on the opinion of Judge Ervin, reported in 179 Pa. Superior Ct. 1.

Mr. Justice Musmanno files a dissenting opinion in which Mr. Justice Bell joins as to the first and third grounds therein set forth.

Dissenting Opinion

(4) DISSENTING OPINION

Musmanno, J., filed: January 5, 1956

I would grant a new trial in this case for any one of three reasons: (1) Two strangers had dinner with the jury; (2) The trial assistant district attorney, with evidence in the case that the defendant was a Republican ward leader, charged that the Republicans had misruled Philadelphia for 69 years; (3) The assistant district attorney told the jury that he could not call certain witnesses because of fear they might possibly be murdered, presumably by the defendants, of whom the appellant here was one.

1. *Two strangers dined with the jury*

When it appears to the trial judge that a trial may be unduly protracted, he may, under the Act of May 1, 1935, P. L. 127, 17 P.S. §1153, allow the selection of two additional jurors "who shall be seated near the jury," to take the place of one or two who may die or become incapacitated. The Act is to cover only such emergencies as may arise during the trial, so that if no substitution occurs within that time, the alternates "shall be discharged upon the final submission of the case to the jury." The Act also specifically states that the alternates *"shall not retire with the jury of twelve after the case is submitted to it."*•

In the case at bar, two additional jurors were chosen and attended upon the trial until the last day, March 24, 1954. At 6:45 p.m. on that day the Trial Judge completed his instructions to the jury without having had to use the

• All italics, mine.

two alternates. It became his duty, then, at that moment, to discharge the alternates, as the Act mandatorily directs. From that instant the alternates had no more right to sit with the jury than did the spectators in the courtroom. The two alternates in this case never really formed part of the jury. They were, as it were, vice-jurors, and could not function as jurors any more than vice-presidents or lieutenant-governors may act in an executive capacity unless their principals die or are disabled.

It needs no citation of authority to show that a case is "submitted" to the jury when the Judge completes his charge. The Judge, therefore, properly declared at the termination of his instructions that the services of the two alternates "will no longer be required on this jury." At this point the two alternates were no more privileged to participate in the trial than plumbers have the prerogative to remain to dine and socialize with the family after they have completed the repair work for which they were called. But the learned Trial Judge here, instead of thanking and bidding the alternates good-night and good-bye, as he should have done, invited them—unquestionably in a spirit of hospitality, cordiality and good nature—to have dinner with the jury. This was error. He then compounded the error by adding that: "I am certain that they [the alternates] will be interested in the outcome that will be arrived at by their colleagues in the jury box." As a matter of reality, the original twelve were no longer colleagues of the two alternates. With the ending of the trial, the law intends that the jury shall disappear behind a curtain which is to be impenetrable not only to alternates but to the entire world as well. By declaring that the alternates would "be interested in the outcome," the Judge suggested, unintentionally of course, that the alternates had a *right* to

have that interest satisfied. But, so far as the law is concerned, the interest of the alternates could rise no higher than the general curiosity of the public, of which they were now an intermingled part. The fact that the Judge said: "Do not discuss the case until you retire to the jury room" did not scrape off the patina of authority which covered his declaration that the alternates were "interested in the outcome."

Did the two alternates take advantage of the fraternization with the twelve at dinner to ascertain what that outcome was to be? The record does not state how long the dinner lasted but it does not seem that the overall deliberations of the jury were very lengthy since the verdict was returned at 11 p.m. Nor was there any formal truncation of the association between the alternates and the jurors. The alternates were authorized to go to dinner with the jurors, but no one in authority supervised the dinner, and no one specified the time that the alternates were to depart. This obviously was a very loose manner in which to handle a vital matter which concerned the liberty of a person on trial.

What happened at the dinner? For eight days the two alternates had associated with the jury. In eight days a very friendly relationship can and does usually develop among Americans who are engaged in a common enterprise, somewhat detached from the rest of the workaday world. Can it be said, in view of this type of camaraderie, that on the last day, as the fourteen sat at the friendly dinner table, they all sealed their lips on the subject which had been their constant source of profound interest for the preceding eight days?

Knowing human nature as we do, can it be said that as the fourteen companions buttered their bread, salted their soup, ketchuped their meat, and peppered their vegetables, no one added the spice of a comment on the case which had been their fare for eight days? And during those last few moments at the table, as the two alternates drained their coffee cups and pushed away the dessert plates, is it consistent with everyday experience to assume that not a word was spilled on the drama they had been witnessing, and in which to a great extent they had participated for eight days? And if there was only one reference to the case, the defendant is entitled to a new trial because the two former alternate jurors were no more entitled to speak to the twelve jurors on the case than were the waiters who served them their food.

Moreover, the granting of a new trial does not depend on proof that the two alternates actually did discuss the case with their former colleagues. It is enough to vitiate the trial that they had the *opportunity* to discuss it. In the monumental case of Commonwealth v. Krick, 164 Pa. Superior Ct. 516, 521, two alternate jurors went into the jury room with the other twelve and remained there ten minutes. It was argued in that case that there was no proof that the two had improperly discussed the evidence with the original twelve, but in ordering a new trial the Superior Court very fairly and courageously said:

> "We have no way of knowing whether the alternates deliberated with the other twelve during those ten minutes or in any way influenced their decision, but we cannot say with fair assurance that the error was harmless. To allow the alternates *any opportunity* to deliberate with the others after the case had

been submitted was a direct violation of the Act, and constitutes reversible error."

It cannot be denied and it is not denied that the alternates here had the *opportunity* to discuss the case with the original twelve. Therefore, unless the Krick case is overruled, which it is not, it is incomprehensible to me how the decision in this case can stand. The facts before us on this appeal are even stronger than they were in the Krick case since the jurors here spent at least an illegal hour with their former colleagues whereas in the Krick case the improper commingling was limited to ten minutes.

Under the ruling in the case of Commonwealth ex rel. Darcy v. Claudy, 367 Pa. 130, jurors may not be questioned as to their deliberations after the verdict has been rendered. With a cloak thus drawn over their conversations, it is as logical to assume that the alternates and jurors did the normal thing and did discuss the case at meal time as it is to assume that they closed their minds and their mouths on the subject. Certainly it is unfair to deny attorneys the right to find out exactly what happened and then conclusively hold that the alternates did not speak to the twelve on the case.

The decision of the majority here is regrettable, not only because it confuses the picture as to when the services of alternate jurors really terminate, but it throws into shadow the matter (never heretofore questioned) as to when a case is regarded "submitted to the jury." The Act of 1935, as indicated, prohibits that alternates shall retire with the jury after the case is submitted. Since this Court now holds that the alternates may remain with the jurors even after the termination of the Court's instructions, the legal profession must assume that the Supreme Court now

rules a case is not submitted to a jury at the end of the charge, but that the submission may wait until the jury has dined. And if, for any reason, the instructions end at a late hour and the dinner comes still later and the jury retires for slumber, beginning their deliberations the following morning, will it be proper for the two alternates to sleep in the dormitory with the other jurors until the next morning? And if submission of a case no longer coincides with the ending of the Court's instructions, does this now mean that the trial remains open after the Judge's charge —even to the extent that the parties may yet introduce further testimony?

Heretofore the line of demarcation between the Court's immediate jurisdiction over the jury and the jury's own autonomous deliberation was distinct. As soon as the Judge completed his charge, the jury took over. Under the decision in this case, however, the line of demarcation has dimmed and perhaps disappeared entirely. Are we to understand that there will now be an interregnum between the two jurisdictions? Is there to be an interval where the Court has lost control and the autonomy of the jury has not yet begun? And does it mean that during that twilight zone anyone can dine with the jury, talk to the jury, or play with the jury? Is this a desirable state of affairs?

I am afraid that in a zealous determination to affirm what they regard as a proper conviction, the judges have in this case introduced a precedent which will do considerable damage to regular and accepted procedure and leave in troublesome doubt the proposition as to wher. alternate jurors cease being what they never were.

I believe that this Court has lost an opportunity to clarify what needs to be clarified and it has ignored a task

knocking at our door for attention. By this neglect it is allowing the alternate juror system to float on an aimless sea, "each way and none."

2. *Political partisanship in a trial*

During the cross examination of a Commonwealth witness, defense counsel, for the purpose of showing bias, asked the witness if he had changed his registration from Republican to Democratic and had not gotten a job under Charles Baker, "Democratic City Commissioner," whereupon the trial assistant district attorney remarked: "He would only be a Democrat because the Democrats are in, Mr. Witkin, after 69 years of misrule." Since it was well known that the defendant was a Republican ward leader, this reference to the Republicans being guilty of 69 years of misrule could only be prejudicial to him. The accused had the right to be tried on his own record and not on what the entire Republican Party might or might not have done in 69 years. It was not proper that he should be smitten as was Balaam's ass with faults not proved to be his own.

When defense counsel moved for the withdrawal of a juror, the motion was denied and the Court adjured the jury:

> "The jury will be strongly urged to ignore completely all references to Republicans and Democrats. We are here as Americans. We are not concerned with the party allegiance of any of the witnesses or any of the defendants or any of the persons referred to."

This adjuration was not sufficient. The assistant district attorney should have been reprimanded for his remark which, at least for the moment, turned the trial into a political contest and away from a serious, solemn ascer-

tainment of the truth of the charges in the indictment which, of course, made no reference to political parties.

To charge the Republicans with 69 years of misrule and suggest that the defendant, since he was a Republican, was part of that misrule, saddled upon him a burden which the Commonwealth had no right to place upon him—and the jury should have been so instructed. The most essential function of a trial judge is to keep the testimony flowing in the channel of relevancy so as to avoid disputations on issues having no bearing on the question of guilt or innocence. The assistant district attorney apologized to the Court for his remark but he did not retract it, thus allowing the charge to hang over the cliff of indecision, with the Court neither ordering it withdrawn or cutting the rope to let it fall into the abyss of harmless error.

3. *The Assistant District Attorney's remark that certain witnesses might be killed*

In a colloquy participated in by the Court, the assistant district attorney and defense counsel, the question arose as to why a certain person, Buddy Mitchell, brought to Philadelphia from Georgia by the Commonwealth, was not called to testify. During this colloquy the following occurred:

> "Mr. Witkin: The purpose of offering that letter was to contradict the Commonwealth's witness that I will refer to later.
>
> The Court: It is in.
>
> Mr. Crippins: If your Honor pleases, Mr. Mitchell's name is not on any of the bills; he was not used at the grand jury, and I can assure Mr. Witkin that there are certain other witnesses who were questioned for

weeks who were not called here, again for security reasons. We can't give their names.

The Court: It would be improper to produce that evidence.

Mr. Crippins: They were sitting here in this courtroom and they were not called *because we want them to live after this is over.*

Mr. Witkin: May it please Your Honor, Mr. Crippins has just made the statement—

Mr. Crippins: He made—

Mr. Witkin: I am addressing the Court.

Mr. Crippins has just made the statement they have not been called because 'we want them to live after the case is over.'

Mr. Crippins: That is right.

Mr. Witkin: I know of no remark more prejudicial to the defendants than this one, and on behalf of Roy Dixon and also on behalf of my colleagues for their respective defendants, I again most reluctantly and unwillingly ask for the withdrawal of a juror."

Mr. Crippins' remark that certain witnesses were not called because he wanted "them to live after this is over," could only mean that if those witnesses testified they would be killed. Since the witnesses would be testifying against the various defendants on trial, of whom Roy Dixon was one, it could only be inferred that the killers would be the defendants or other killers operating in their behalf. This monstrous charge by the assistant district attorney could not possibly be cured by any instruction from the Court.

Even so, as against this flagrant breach of propriety and this inexcusable imputation of conspiratorial murder, the Court merely cautioned the jury to "ignore the last few words spoken by Mr. Crippins." What were the "last few words?" At this instant an imperious duty devolved upon the Trial Judge either to declare a mistrial or to explain in easily-understood language that the Assistant District Attorney was out of order, that the Court would protect all witnesses, and that there was no evidence that the defendant would or could do the witnesses any harm. Failing this, the Judge's words of "caution" were meaningless, and allowed the jury to believe that the defendant was indeed capable of visiting great harm, even death, on the witnesses.

It is also to be noted that when Mr. Witkin complained to the Court about Crippins' statement that "we want them to live after this is over," Mr. Crippins dogmatically reaffirmed his indefensible utterance with the remark: "That is right." This bravado could only convey to the jury that the defendant formed part of a gang capable of wiping out witnesses who dared to testify against him and his associates. There is scarcely a more serious charge that could be brought against any litigant in a court of law; and it must now remain an enigma in the State Reports how the Majority of this Court could allow so gross a dereliction to go uncorrected.

In the entire 900 printed pages of the record there is not a syllable of testimony to justify the insidious insinuation that the appellant here threatened Commonwealth witnesses. It is not enough to say, as the Commonwealth has contended, that the remarks of the prosecutor were without effect since the jury acquitted the defendant on

certain counts and convicted him on others. Without the prosecutor's homicidal innuendo, the jury might have acquitted the defendant on all counts.

The prosecuting attorney is a potent figure in the arena of criminal law. Clothed with quasi-judicial power, displaying direction and control over clouds of witnesses, appearing with regularity before jurors in trial after trial, moving through the courtroom with familiarity and assurance, a charge fulminated by him in the awesome atmosphere of a legal battle takes on, in the eyes of the jurors, the aura of authoritative fact. Especially is this true if the trial is a long one and the defendants are numerous. It is easy for the prosecutor, in such a setting, to convey the impression that in some form or another there stalks among the defendants the sinister phantom of dire deeds unrecorded and unproved, but nonetheless existent, and of which he alone, the prosecutor, is aware. Why otherwise would he hurl so grave an imputation? The jury is then further impressed when the Court merely mentions to the jury that the remarks are to be ignored. Telling the jury to ignore so weighty a denunciation is like asking them to forget they have seen the flash of a dagger, if in fact they have seen one.

As soon as the assistant district attorney charged that his witnesses travelled under the threat of assassination at the hands of the defendants, the fairness of the trial was torn asunder as lightning rips open the sky in a storm. Although the Court refused to withdraw a juror and declare a mistrial, a mistrial nonetheless followed. What ensued was no longer a trial but a mere sham and mockery. Due process disappeared, neutrality vanished, impartiality ceased to exist, and the defendant was at the

mercy of invisible accusers, ominous caprice, and remorseless chance.

I dissent.

Mr. Justice Bell joins in this dissenting opinion as to the first and third grounds therein set forth.

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MAY 16 1956

IN THE

Supreme Court of the United States

October Term, 1955 No. 817

ROY DIXON

v.

COMMONWEALTH OF PENNSYLVANIA

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

Brief for the Commonwealth of Pennsylvania in Opposition

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OPINIONS BELOW

An opinion was written by the Supreme Court of Pennsylvania and is reported in 383 Pa. 474, 119 A. 2d 261. It is printed in Appendix A of petitioner's brief.

An opinion was written by the Supreme Court of Pennsylvania and is reported in 179 Pa. Superior Court, 115 A. 2d 811. It is also printed in Appendix A of petitioner's brief.

An opinion was rendered by the Court of Oyer and Terminer and General Jail Delivery for the City and County of Philadelphia and is unreported. It is printed in Appendix A of petitioner's brief.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered on January 5, 1956. A petition for reargument was filed on January 13, 1956, and was denied on January 19, 1956. The jurisdiction of this Court is invoked under Title 28 U. S. C., Section 1257, Subsection (3).

ARGUMENT

Petitioner seeks to have this Court review on Certiorari his conviction of the crimes of setting up and maintaining a lottery and conspiracy to set up and maintain a lottery.

A. THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT WAS NOT VIOLATED BECAUSE OF IMPROPER AND PREJUDICIAL REMARKS OF THE ASSISTANT DISTRICT ATTORNEY OF PHILDELPHIA COUNTY.

Petitioner avers that the Due Process Clause of the Fourteenth Amendment was violated because two improper and prejudicial remarks were made during the course of the trial by an Assistant District Attorney of Philadelphia. Several quotations from the trial record are cited in support of this contention. (Record pages 501a, 629a-637a).

It is submitted that one quotation is taken out of context for the record clearly shows that the remark was elicited and *provoked* by counsel for petitioner. Before the Assistant District Attorney made a statement about Democrats, counsel for petitioner stated not less than ten times that the witness had been given a job by a Democratic official.

The other remark complained of was: "They were sitting here in this courtroom and were not called because we want them to live after this is over". Immediately prior to this statement, the defense read into evidence a letter wherein it was stated, inter alia, that another witness fled Philadelphia "in fear of her life" and when she was brought back she was "still terrified and afraid." Counsel for defendant then argued the meaning of, and the purpose for, offering the letter into evidence. At this point the questionable statement was made.

It is to be noted that the trial court, after both incidents, instructed the jury to disregard remarks made by

counsel. It is to be further noted that out of the hundreds of pages of testimony developed below, petitioner has questions only two statements.

The facts in the case at hand are similar to the facts developed in *Buchalter v. New York*, 319 U. S. 427 (1942). In the *Buchalter* case, counsel for defendant delivered speeches to the jury which provoked statements by the county district attorney. The Supreme Court stated at page 431: "This does not raise a due process question." It is strongly urged that this case is controlling, and as applied here, compells a conclusion that petitioner was not deprived of his liberty without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

B. THE DUE PROCESS CLAUSE OF THE 14TH AMENDMENT WAS NOT VIOLATED BY JUDICIAL PROCESS OF ANY COURT BELOW.

I. ALTERNATE JURORS DID NOT RETIRE WITH THE JURY OF TWELVE AFTER THE CASE WAS SUBMITTED TO THE JURY BY THE TRIAL COURT.

The Act of May 1, 1935, P. L. 127, 17 Purdon's Statutes Annotated, Section 1153 provides in part:

> "Such alternate jurors . . . shall not retire with the jury of twelve after the case is submitted to it. . . ."

Petitioner avers that this statute was violated and that the violation constituted a deprivation of due process of law. It is the Commonwealth's position that the facts *clearly* show a compliance with the statute.

After the trial was completed, the court permitted the two alternate jurors to have dinner with the rest of the jury. The court stated:

> "We will adjourn court until 9:30. Members of the Jury, don't rush to any verdict. You will have your

dinner now, and then you will come to the jury room for your deliberations.

"As you retire, I want to thank the two ladies who served as alternates for their patience and their endurance. However, their services will no longer be required on this jury. I am sure they will be interested in the outcome that will be arrived at by their colleagues in the jury box. The two alternates will have dinner with the rest of the jury. Then the jury will retire, with the twelve jurors going into the jury room. Do not discuss the case until you retire to the jury room. The court will reconvene at 9:30." (Record page 1273.)

It is apparent therefore, that the alternates neither retired nor deliberated with the rest of the jury. Petitioner has not *offered* to prove that the alternates deliberated during the course of the dinner. He merely states that they had an opportunity to deliberate. It is submitted that a similar opportunity existed at every other stage of the trial, the jury and alternates having lived together many days and having partaken of numerous meals in the company of each other.

Counsel for petitioner relies upon the decision in the case of *Commonwealth v. Krich*, 164 Pa. Superior Court 516 (1945), where it was held that it was error to allow alternate jurors to retire to the jury room and deliberate with the jury, even though the alternates were withdrawn after they had been in the room ten minutes. It is clear that the factual situation in the *Krich* case is quite different from that of the case at hand. Therefore, the Pennsylvania Courts properly held that the *Krich* case was not controlling.

II. Due Process of Law Does Not Guarantee that Decisions of State Courts Be Free from Error; Nor Does It Require that State Court Decisions Be Consistent.

Assuming, arguendo, that the case of *Commonwealth v. Krich*, supra, should have been applied as controlling by Pennsylvania Courts, there has still not been a violation of defendants rights guaranteed to him by the Constitution of the United States.

Due process of law does not guarantee that decisions of state courts be free from error, nor does it require that decisions shall be consistent. *Worchester County Trust Co. v. Riley*, 302 U. S. 292 (1937), affirming *Riley v. Worchester County Trust Co.*, 89 F. 2d 59, reversing *Worchester County Trust Co. v. Long*, 14 F. Supp. 754. Therefore, if an inconsistency exists, it does not raise a federal question.

CONCLUSION

Since the petition for writ of certiorari raises no special and important reasons, and since it raises no federal question of substance, it is respectfully submitted that it should be denied.

Respectfully submitted,

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